

The Development and Comparative  
Aspects of  
Australian Maritime Law.

by  
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## Declaration

This dissertation is the result of my original research: borrowed sources have been duly acknowledged in the text and footnotes.

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Thesis Abstract

The development of Australian maritime law was closely associated with Britain's Empire-building. To promote, and later consolidate, trade and security links within the Empire, a large merchant fleet to be manned almost exclusively by British seamen was created. For merchant shipping to operate as an effective and coherent force, a single body of law was specially enacted to regulate this enterprise.

Maritime law was a domain reserved for the Parliament of Great Britain and later the United Kingdom. The nature and content of this subject, as imported, administered and developed in the Australian colonies, and later States, are analysed in the light of the Imperial goals. This body of law developed and changed in conformity with the Imperial objectives. The use of paramount legislation, the invalidation of inconsistent colonial laws and the establishment of courts in the colonies, and later States, to administer Imperial maritime law were clearly part of a coordinated Imperial strategy. The mechanisms for exacting compliance by Commonwealth legislators continued until the Statute of Westminster 1931 (Imp.) was adopted.

One of the main problems which the High Court had to resolve was the recurring conflict between Commonwealth and State legislation on shipping. The cause in most cases was the lack of precision between the powers conferred under the Commonwealth Constitution and those exercisable by meeting the requirements of the Imperial legislation. Several High Court decisions have significantly enlarged the role of Commonwealth legislation at the expense of State legislative powers.

The major differences between the maritime laws of Australia and the United Kingdom are traceable to several factors. First there was delay or failure by the Commonwealth and State Parliaments to extend to Australia or the States the operation of those provisions of the United Kingdom's legislation that would not otherwise apply. Second, the existing backwardness of Australian maritime law has stemmed from a prolonged indifference to a number of international conventions which have produced vital changes in maritime law. Third, Australia's departure from the strict "British ship" concept has led to a marked relaxing of the requirements for owning

Australian ships or shares therein.

Wherever considered appropriate, emphasis is placed on the advantages which proceedings in rem have over common law actions. The comparative analysis has brought to light many anomalies. With regard to a number of maritime matters the laws of the Commonwealth and several States are inconsistent. In many instances, it is patently illogical for penalties and strict liability to be imposed personally on shipowners and the master under the anti-pollution laws. Often the enforcement of such laws may also result in the unjustified destruction of maritime property, with the consequent loss of the existing maritime liens and other claims against the ship and freight. A workable solution may be found by integrating anti-pollution legislation with maritime law. Moreover, the methods for enforcing payment of statutory compensation for accidental injury or death suffered by seamen are examined with the view to strengthening the position of claimants.

The various problem areas and anomalies highlighted are dealt with in the context of the reforms and changes which are deemed desirable to upgrade Australian maritime law. Chapter Nine discusses the important benefits and new protection that will be conferred on maritime claimants when the Draft Admiralty Bill 1985 is enacted as law.

## Table of Cases

(vi)

	Page
"Abadesa", The [1968] 1 Lloyd's Rep. 493.....	495
Addis v. Baker & Others (1792)	
An Struther's Rep., vol. 1, 222.....	4
Agricola, The (1843) 2 Wm. Rob. 10.....	104
A.H. Badger, The (1872) 11 S.C.R. (N.S.W.) 157.....	67
Aichhorn & Co. K.G. and Switzerland General Ins. Co. Ltd. v. The Ship M.V. "Talabot" (1974) 132 C.L.R. 449.....	613
Aid, The (1822) 1 Hag. Adm. 83.....	366
Ajubita v. S/S Peik, C.A. La. (1970) 428F. 2d. 1345.....	403
"Albion", The (1872) 3 V.L.R. 1.....	529, 597
Alde, The [1926] P. 211.....	574
Alex, Cowan & Sons, Ltd. and Others v. The "Ship Marlborough Hill", (1919) 19 S.R. (N.S.W.) 306.....	304
Alexander, The, 1 W. Rob. 360.....	523
Alexander, The (1812) 1 Dods. 278.....	388
"Aline", The (1839) 1 W. Rob. 111.....	379, 399
Alletta, The [1974] 1 Lloyd's Rep. 40.....	563
Alnwick, The [1965] 2 All E.R. 569 (C.A.).....	414
Alphacel Ltd. v. Woodward [1972] A.C. 824.....	224
Amalia, The (1863) 8 L.T. (N.S.) 805.....	443, 446
"Amoco Codiz", The [1984] 2 Lloyd's Rep. 304.....	214, 216, 437
Andaline, The (1886) 12 P.D. 1.....	243
Andrea Ursula, The [1973] 1 Q.B. 265.....	611
Andre Theodore, The (1904) 10 Asp. M.C. 94.....	599
Anglo-Indian, The (1968) 8 N.S.W.L.R. 102.....	350
Anna R. Heldritter, The (1923) 289 F. 112 (D. C. Mass.).....	403
Annie, The (1886) 12 P.D. 50.....	365
Annie, The [1909] P. 176.....	327
Anonymous 1 Ventr. 146.....	332
Anonymous (1796) 11 Mod. Rep. 6.....	14
Appollo, The (1824) 1 Hag. Adm. 306.....	556
"Aquila" The (1798) 1 C. Rob. 37.....	14
A Raptis & Son (Regd.) v. State of South Australia (1976) 15 A.L.R. 223.....	130
Armstrong v. Armstrong (No. 1) (1854) 21 Beav. 71.....	163
Arthur Guinness, Son & Company (Dublin) Ltd. v. The Freshfield (Owners) and Others [1965] P. 294.....	473
Asa Packer, The, N.S.W. archives 4/7599.....	517
"Asean Promoter", The [1982] 2 M.L.J. 108.....	617
Asiatic Steam Navigation Co. Ltd. v. Commonwealth of Australia (1956) 30 A.L.J. 159.....	118, 455
Asiatic Petroleum Company Ltd. v. Lennard's Carrying Company Ltd. [1914] 1 K.B. 419.....	437, 463
A.S.N. Company v. Smith and Others, Smith and Others v. A.S.N. Company (1889) 6 W.N. (N.S.W.) 3.....	521
Athalvictor, The [1946] P. 42.....	577
Atkinson v. Maling (1788) 2 T.R. 462.....	26
Atlas, The (1862) Lush. 518.....	367
Atlas, The, 2 Hagg. Adm. 48.....	95
Aucher, Ex parte (1896) 17 N.S.W.R. 435.....	771
Australian Banking Co. v. Burns, The (1889) 9 W.N. (N.S.W.) 19.....	48
Australian Coastal Shipping Commission v. Averell, The (1969) 43 A.L.J.R. 335.....	285
Australian Coastal Shipping Commission v. O'Reilly (1961-1962) 107 C.L.R. 46.....	127, 130



Brown v. Tanner (1868) L.R. 3 Ch. 597.....	561
Bruce v. Moore, Ex parte Moore (1911) St. R. Qd. 57.....	111
Bruhn v. Australian Steamships Pty. Ltd. (1922)	
31 C.L.R. 136,.....	345
Burnard & Alger v. Player (1928) 31 Ll.L.R. 281.....	278
Burns Philp & Co. Ltd. v. Nelson and Robertson Pty. Ltd.	
[1958] A.L.J. 921.....	381
Butler and Another v. The Ship (1930)	
47 W.N. (N.S.W.) 66.....	103, 110, 114
Buxton v. Snee (1748) 1 Ves. Sen. 155.....	8
Caledonian Collieries Ltd. v. Speirs	
(1957) 97 C.L.R. 202.....	248
Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"	
(1977) 51 A.L.J.R. 270.....	217, 506, 578
Cambria, The (1848) Pritch Ad. 3rd ed., vol. II, p. 1822.....	373
Camden v. Anderson (1794) 5 Term Rep. 709.....	151
Cameco v. S.S. American Legion [1975] 1 Lloyd's Rep. 295.....	424
Campbell v. Hall Lofft 650, Cowp. 204.....	37
Cammell Lavid & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd.	
[1934] A.C. 402.....	594
Campbell v. Thompson (1842) 2 Hare 140.....	173
Campbell v. Stein (1818) VI Dow 116,.....	150
Cannan and Others v. Meaburn and Others (1824)	
1 Bing. 465.....	481
Cap Blanco, The [1913] P. 130.....	295, 301, 327
Cape Packet, The (1848) 3 W. Rob. 122.....	366
Cargo, Ex Galam (1863) 2 Moo P.C. (N.S.) 216.....	590
Cargo, Ex Sarpedon, The (1877) 3 P.D. 28.....	365
Cargo ex Sultan, The (1859) Swa. 504.....	313
Carl Johanen, The (1821) 2 Hagg Ad. Rep. 186; 3 Hag. 186.....	441
Carsar v. Spreckles (1905) 141 Fed. Rep. 260 (C.C.A.).....	574
"Cartella", The v. The "Inverness Shire"	
(1916) 21 C.L.R. 387.....	361, 591
Casey and Others v. The Deccan [1906] S.A.L.R. 125.....	331
Castilla, The (1822) 1 Hag. Adm. 59.....	20
"Castlegate", The [1893] A.C. 38.....	334, 340, 341, 598, 609
Castrique v. Imrie (1870) L.R. 4 H.L. 414.....	563
Cato v. Irving (1851-1852) 21 L.J. Ch. (N.S.) 675.....	174, 175
C. & C. J. Northcote v. The Owners of the Henrich Bjorn	
(1886) 11 App. Cas. 270. (House of Lords).....	313, 323
Champion, The [1934] P. 1.....	371, 452
Chapman & Co. Ltd. v. Rose [1914] St. R. Qd. 302.....	291
Charlotte, The (1848) 3 Wm. Rob. 68,.....	356
Chartered Mercantile Bank of India, London and China, The	
v. The Netherlands India S.N. Co. Ltd. (1883) 10	
Q.B.D. 521.....	2, 27
Chasteauneuf v. Capeyron (1882) 7 App. Cas. 127 (P.C.).....	178
Chavasse, Ex p., re Grazebrook (1865) 4 De G. & S. 655.....	620
Chieftain, The (1863) Brown & Lush. 212; 167 E.R. 340.....	411
China Ocean Shipping Co. and Others v. State of South	
Australia (1979-80) 27 A.L.R. 1.....	89, 106, 117, 118, 325,
.....	450, 453, 502
Christiansbory, The (1885) 10 P.D. 141 (C.A.).....	416
Christie v. The Ship "Karu" (1927)	
27 S.R. (N.S.W.) 443.....	320, 593
Christina 3 W. Rob. 27; S.C. 6 Moore P.C. 379.....	526
City of Chester, The (1884) 9 P.D. 182.....	581
"City of Colombo", The [1978] 2 Lloyd's Rep. 587.....	431
City of London, The (1839) 1 Wm. Rob. 88.....	601

City of Mecca, The (1879) 5 P.D. 28.....	562
Clara Killam, The (1870) L.R. 3 A. & E. 161.....	566
Clarke v. The Union Steamship Company of New Zealand Ltd. (1914) 18 C.L.R. 142.....	289
Clay v. Sudgrave 91 E.R. 34.....	333
Clifford v. Hunter (1827) M. & M. 103.....	570
Club Coffee Co. Ltd. v. Moore-McCormack Lines, Inc. [1968] 2 Lloyd's Rep. 103.....	430
Clyde Engineering Co. Ltd. v. Cowburn (1926) 37 C.L.R. 466.....	130
Coal Cliff Collieries Ltd. v. The Saros; Hazelwood Steamship Co. Ltd. v. The Saros (1915) 33 W.N. (N.S.W.) 3.....	100, 103
Coggs v. Bernard (1703) 2 Raym. 909.....	38
Colorado, The [1923] P. 102.....	403, 404, 559, 602
Commonwealth of Australia v. Asiatic Steam Navigation Co. Ltd. and Others [1955] 1 Lloyd's Rep. 503.....	495
Commonwealth of Australia v. Asiatic Steam Navigation Company Ltd. [1955] 1 Lloyd's Rep. 503.....	165
Commonwealth, The v. The Limerick Steamship Co. Ltd. (1929) 35 C.L.R. 69.....	88
Commonwealth, The v. Oliver (1962) 107 C.L.R. 352, p. 361.....	284
Commonwealth, The v. Wright (1956) 96 C.L.R. 536, .....	285
Conoco Britannia, The [1972] 2 All E.R. 238.....	586
Coombes v. Mansfield (1855) 3 Drew 193.....	178
Cooper and Another v. South, Briggs, Smith, Banks, Watson and Ruder (1813) 4 Taunt 803; 128 E.R. 547.....	164
Cooper v. Stuart (1889) 14 App. Cas. 286.....	29
Co-operative Dried Fruit Sales Pty. Ltd. v. The Ship "Terukawa Maru" [1972] 46 A.L.J.R. 357.....	299, 550, 588
Cope v. Doherty (1858) 70 E.R. 154.....	441
Cotter v. Huddart Parker Ltd. (1941) 42 S.R. (N.S.W.) 33.....	274
Couch v. Steele 3 E. and B. 402.....	81, 263, 264
Countess of Harcourt, The (1824) 1 Hag. Adm. 248.....	18
Cox v. Lo Fook, Lo Lock and Ho Poo (1909) Tas. L.R. 53.....	54
Cythera, The [1965] N.S.W.R. 146.....	367
Crooks v. Allan (1879) 5 Q.B.D. 38.....	590
Currie v. M'Knight [1897] A.C. 97, . . . . .	329, 382, 386, 400
Czech v. General S.N. Co. (1867) L.R. 3. C.P. 14. ....	305
Dafter v. Creswell (1826) 172 E.R. 73 .....	18
Dalgety Australia Ltd. v. Griffith [1980] 24 S.A.S.R. 249.....	202
Dalgety (Australia) Ltd. v. Griffith (No. 2) [1980] 26 S.A.S.R. 257.....	227
Dalgety & Co. Ltd. v. Aitchison; The "Rose Pearl" [1957] 2 F.L.R. 219.....	316, 317, 322
Dantzic Packet, The (1837) 3 Hag. 385.....	373
Davey v. Union Steamship of New Zealand [1953] S.A.S.R. 35.....	285
Davidson v. Mekiben (1821) 3 B. & B. 112.....	104
Degrave v. Hedges (1707) 2 Raym. 1285 .....	7, 556
Delamainer v. Winteringham (1815) 171 E.R. 60.....	21
Delohery v. Permanent Trustee Co. of N.S.W. (1904) 1 C.L.R. 283.....	30, 60
Despina, The G.K. [1982] 1 All E.R. 1.....	563, 565
Diamond, The [1920] P. 56.....	540
Diamond Alkali Export Corporation v. Bourgeois, [1921] 3 K.B. 443, . . . . .	304
Dictator, The [1892] P. 304.....	222, 614



Dixon v. Ewart (1817) 3 Mer. 322, 332.....	150, 171, 172, 175
Dixon v. Sadler (1841) 5 M. & W. 405, 414, 415.....	279
Donald Johnson v. John Alexander Black (The "Two Ellens") (1872) L.R. 4 P.C. 161.....	314
Donoghue v. Stevenson [1932] A.C. 562.....	506
"Dorothy Foster", The (1805) 6 C. Rob. 88.....	14
Dullfus Mieg et Compagnia S.A. v. Bank of England [1949] 1 All E.R. 946.....	562
Duncan v. Mirrors Newspapers Ltd. (1978) 142 C.L.R. 585.....	29, 30, 31
"Dundee", The (1823) 166 E.R. 39.....	388, 442, 481
Dupleix, The [1912] P. 8.....	222, 614
Dutton v. Bognor Regis United Building Co. Ltd. and Another [1972] 1 All E.R. 462.....	248
D'Vora, The [1952] 2 All E.R. 1127.....	593
E.A. Shores, The (1896) 73 Fed. Rep. 324.....	383, 574
East and West Steamship Company v. Hossain Brothers [1968] 2 Lloyd's Rep. 145.....	589
Earp v. Barque Conference 10 W.N. 85.....	52
Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners and the Commonwealth of Australia (1950) 83 C.L.R. 353.....	202, 204, 210
Eastern Asia Navigation Co. Ltd. v. Fremantle Trust Commissioners (1950-1951) 83 C.L.R. 353.....	217
Ebrand v. Dancer (1680) 2 Ch. Cas. 26.....	167
Elder, Dempster v. Paterson, Zochonis (1903) 9 Asp. M.L. 475....	278
Ella A. Clark, The, Br. & L. 32.....	316, 524
Edwards (John) & Co. v. Motor Union Insurance Co. [1922] 2 K.B. 249.....	296
Eleanora Charlotta (1823) 1 Hag. Adm. 156.....	14
Electrochrome Ltd. v. Welsh Plastics Ltd. [1968] 2 All E.R. 205.....	506
Elin, The (1883) 8 P.D. 129.....	399, 400
Elizabeth, The (1819) 2 Dods. 403.....	602
Elmville, The (No. 2) [1904] P. 422.....	340, 345
Empress, The (1856) Swab 160; 166 E.R. 1073.....	162, 180
Eschersheim, The [1976] 1 All E.R. 441 (C.A.).....	219
Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218.....	206, 211
Etona, The (1896) 64 Fed. Rep. 880; 71 Fed. Rep. 895.....	383, 574
Europa, The (1863) Br. & L. 89 (P.C.).....	412
Ewart v. Dixon (1817) 3 Mer. 322.....	150
Fair Havens, The (1866) L.R. 1 A. & E. 67.....	330
Fairport, The (1872) L.R. 3 A. & E. 48.....	411
Fairport, The (1882) 8 P.D. 48.....	411
Fairport, The (1885) 10 P.D. 13.....	538
Fairport, The [1967] P. 167.....	602
Fairport, The (No. 5.) [1967] 2 Lloyd's Rep. 162.....	598
Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch. D. 234.....	321
Falconbridge Nickel Mines Ltd. v. China Shipping Ltd. [1969] 2 Lloyd's Rep. 277.....	425
Falkland Islands Co. v. The Queen (1863) 2 Moo. N.S. 266 .....	30
Fang Chin Faa v. Puffett (1978) 22 A.L.R. 149.....	619
Farnell v. Bowman (1889) 12 App. Cas. 643.....	164, 455
Federal Steam Navigation Co. Ltd. v. J. Fenwick & Co. Pty. Co. (1943) 68 C.L.R. 553.....	591

Federal Steam Navigation Co. Ltd. and Another v. Department of Trade and Industry [1974] 2 All. E.R. 97.....	225
Feronia, The L.R. 2 A. & E. 65.....	339
Ferret, The (1882) 8 V.L.R. 1.....	525
Fire Brigade, The v. The Elderslie Steamship Co. (1899) 14 Q.N. (N.S.W.) 320.....	359
Fisher and Others v. The Ship "Ocean Grandeur"; Roberts and Others v. The Ship "Ocean Grandeur" [1972-73] A.L.R. 948.....	363, 364
F. Kanematsu & Co. Ltd. v. The Ship "Shahzada" (1956) 30 A.L.J. 478.....	298, 429, 586
Fletcher v. Braddick (1806) 2 Bos. & Pul. (N.R.) 181.....	16
Flora, The (1929) 2 Hag. Adm 298.....	3, 23
Florence, The (1851) 16 Jur. (Pt. I) 572.....	370
Flower v. Young (1812) 170 E.R. 1368.....	9
Follett v. Delany (1848) 17 L.J. Ch. 254.....	153, 540
Foong Tai & Co. v. Buchheister and Co. [1908] A.C. 458.....	320, 322, 324, 326, 527
Forbes v. Cochrane (1824) 2 B. & C. 448.....	140
Foreman and Ellams, Ltd. v. Federal Steam Navigation Co. [1928] 2 K.B. 424, .....	576
Forsboom v. Kruger (1812) 170 E.R. 1353.....	12
Framlington Court, The (1934) 69 Fed. Rep. (2d) 300.....	279
"Frances, The" (1820) 2 Dods 420.....	151
Franklin, The (1801) 4 C. Rob. 146.....	14
Friesland, The [1904] P. 345.....	360, 361
Frothingham v. Prince 3 Mass Rep. 563 .....	355
Gale v. Laurie and Others (1826) 108 E.R. 58.....	445
Gaggin v. Moss [1983] 2 Qd. R. 486.....	477-478, 547
Garden City, The [1984] 3 All E.R. 59.....	496
Gardener v. Czenove and Another (1856) 26 L.J. (N.S.) 17.....	167
Gates v. Gaggin and Another (1983-84) 51 A.L.R. 721.....	478, 548
Gayler & Pope Ltd. v. Davies & Son Ltd. [1924] 2 K.B. 75.....	207
Geary v. Nivian (1830) 1 Legge 1.....	35
Geelong Harbour Trust Commissioners, The v. Gibbs Bright Co. (1973-74) 129 C.L.R. 576.....	502
Gemma, The [1899] P. 285.....	564
General Credits (Finance) Ltd. v. Registrar of Ships and Another (1982) 44 A.L.R. 571.....	135, 191, 193, 196, 546
General Iron Screw Collier Co. v. Schurmanns (1860) 70 E.R. 712.....	445
General Lincoln, The D.C. Md. (1928) 24 F. 2d. 441.....	416
George Banifer, The (1823) 1 Hag. Adm. 168.....	21
Glaucus, The (1948) 81 Ll. L. Rep. 262.....	356
Glentanner, The Swab. 415.....	339
Glover v. McDougall [1976] 2 N.S.W.L.R. 359, .....	230
Gilroy, Sons & Co. v. Price & Co. [1893] A.C. 56.....	274
Gillespy v. Coutts (1767) A.M.B. 652.....	26
Golubchich, The 1 Robinson 143.....	517
Goods v. James Patrick & Co. Pty. Ltd. [1963] V.R. 334.....	227
Goodwyn (Goodwin) v. Cheveley (1859) 28 L.J. Ex. 298.....	207
Gosse Millerd, Ltd. v. Canadian Government Merchant Marine [1929] A.C. 223.....	576
"Gothenburg, The" (1875) 4 Q.S.C.R. 133.....	355
"Governor Raffles" (1815) 3 Dods. 13.....	15
Goulondris, The [1927] P. 182.....	416
Grand Champion Tankers Ltd. v. Norpipe A/S and Others [1984] 2 All E.R. 343.....	475

Grave v. Hedges, Holt K.B. 470.....	556
Great Eastern, The (1867) L.R. 1 A. & E. 384.....	602
Greenock Corporation v. Caledonian Ry. [1917] A.C. 556.....	250
Hain S.S. Co. v. Tate & Lyle (1936) 41 Com. Cas. 350.....	591
Halkett, Ex parte (1812-1817) Ves. Jr. 9, 473.....	4
"Halley", The (1868) L.R. 2 P.C. 193.....	385
"Halcyon Isle", The [1978] 1 M.L.J. 189.....	405, 419
"Halcyon Isle", The [1980] 3 All. E.R. 197.....	405, 406, 409, 419
Halcyon Skies, The [1976] 1 All E.R. 856.....	603
Hamilton Fraser & Co. v. Pandorf (1887) 12 A.C. 518.....	305
Hanson v. A.S.N. Co. (1884) W.N. (N.S.W.) 75.....	271
Hanson v. Haywood (1907) 152 Fed. Rep. 401.....	383, 574
Hartford v. Jones 2 Salkeld 654; 1 Ld. Raym 393.....	13, 352, 353
Harland & Wolff Ltd. v. Burns & Laird Lines Ltd. 40 Ll. L. Rep. 286.....	328
Harlow, The [1922] P. 175.....	452, 484
Harvey, The (1827) 2 Hag. Adm. 77.....	19
Hatchwell v. Cooke (1816) 6 Taunt Rep. 577.....	12
Hay v. Le Neve 2 Shaw Sc. App. 395.....	391
Helen, The (1865) L.R. 1 A. & E. 1, 4.....	619-620
Henrich Bjorn, The (1886) 11 App. Cas. 270 (H.L.).....	315, 527, 599
Hereward, The [1895] P. 284.....	555
Hibbert v. Rolleston (1792) 3 Bro. C.C. 571, 576.....	170, 171
Hillyard v. Mount (1823) 172 E.R. 338.....	21
Holderness v. Lampport (1861) 29 Beav. 129.....	162, 554
Holderness v. Rankin (1860) 28 Beav. 180; 29 Law J. Rep. (N.W.) Chanc. 753.....	162
Hopper, The No. 66 [1908] A.C. 126, p. 136.....	612
Horlock, The (1877) 3 Mar. L.C. 421.....	154
Houghton, Ex parte (1810) 17 Ves. 253.....	167
Houghton, Ex parte, Gimble, Ex parte (1810) 17 Ves. Jun. 251, 253.....	151
Howe v. Napier (1766) 4 Burr. 1945.....	32, 36, 332, 517
Hubbard v. Johnstone (1810) 3 Taunt 178, 212, per Wood B.....	149, 157
Huddart Parker Ltd. v. Cotter (1942) 66 C.L.R. 624.....	267, 273, 274, 280, 570
Huddart Parker Ltd. v. The Ship Mill Hill and Her Cargo; Master and Crew of the Tug Foremost v. The Ship Mill Hill and Her Cargo [1950] 81 C.L.R. 502.....	362
H. Smith Industries Ltd. v. Melbourne Harbour Trust Commissioners [1970] V.R. 406.....	111
Hugh Mack & Co., In v. Burns & Laird Lines Ltd. 77 Ll.L.Rep. 377.....	328
Hume v. Palmer (1926) 38 C.L.R. 441.....	102, 103, 104
"Ida", The (1860) Lush. 6.....	539
Idas, The (1863) Brown & Lush. 65; 2 New Rep. 45.....	536
"Ioannis Daskalelis", The 32 D.L.R. (3d) 571; [1974] 1 Lloyd's Rep. 174.....	404, 405
Inchmaree, The [1899] P. 111.....	361
Indemaur v. Dames, L.R. 1 C.P. 274 and L.R. 2 C.P. 311.....	265
India, The 32 L.J. (Ad.) 185, p. 187.....	316
"Ironsides", The (1862), Lush 458, 466.....	299
Industrie, The (1871) L.R. 3 A. & E. 303.....	567
Ingram & Royle, Ltd. v. Services Maritimes Du Treport, Ltd. [1914] 1 K.B. 541.....	274, 499

Inna, The [1938] P. 148.....	400
Insurance Co. of North America v. Japan Line Ltd. [1974] A.M.C. 2443.....	423
Isbella 3 Hagg. Adm. Rep. 427.....	525
J.A. Johnston Co. v. The Tindelfjell [1973] 2 Lloyd's Rep. 253.....	424
Jackson v. Vernon (1789) 1 H. BL. 114.....	25
Jacob, The (1802) 4 C. Rob. 245.....	10
Jade, The (The Eschersheim) [1976] 1 All E.R. 441.....	215, 219, 255
J. Gadsden Pty. and Another v. Australian Coastal Shipping Commission (1977) 31 F.L.R. 157.....	307, 309, 588
James v. The Commonwealth (1939) 62 C.L.R. 339.....	429
James Patrick and Company Ltd. v. The Union Steamship Company of New Zealand Ltd. (1938) 60 C.L.R. 650.....	469, 477
James W. E/well, The [1921] P. 351.....	395
Jane & Matilda (1823) 1 Hag. Adm. 187.....	22
Jennings v. Griffiths (1824) Ry. & Mood 43.....	9
Jessie Hedley v. The Pinkney & Sons Steamship Co. Ltd. [1894] A.C. 222.....	268
Joannis Vatis, The (No. 2) [1922] P. 213.....	614
John Card and David Cannan v. William Hope (1824) 2 B. & C. 661.....	7
John Sharp & Sons Ltd. v. The Katherine Mackall (1924) 34 C.L.R. 420.....	102, 105, 533
"Johann Friederick", The (1839) 1 W. Rob. 36.....	36
Jones, Ex parte (1832) 2 C. & J. 513.....	173
Jones v. Llanrust U.D.C. [1911] 1 Ch. 393.....	206
Joyce v. Australian United Steam Navigation (1939) 62 C.L.R. 160.....	287
"Julindur", The (1853) 1 Sp. Ecc. & Ad. 72; 164 E.R. 42.....	334
Kali Boat Building and Repair Pty. Ltd. v. The Motor Fishing Vessel "Bosna" and Others [1977] 19 S.A.S.R. 112.....	319, 325
Kammerheire v. Rosenkrants (1822) 1 Hag. Adm. 62.....	10, 396
Keeney and Others v. The Ship "Aneiura" (1927) V.L.R. 387.....	335, 602
Keith v. Burrows (1877) 2 App. Cas. 636.....	560
Kilpatrick v. Huddart, Parker & Co. Ltd. (1895) V.L.R. 125.....	74, 270
King of the Two Sicilies, The v. The Peninsular and Oriental Steam-Packel Co. (1849-1850) 19 L.J. Ch (N.S.) 488.....	146
King v. Owners of S.S. Argylishire (1922) St. R. Qd. 186.....	393
King, The v. Turner, Ex parte The Marine Board of Hobart (1927) 39 C.L.R. ....	106, 123, 125, 127, 133
"Kirknes", The [1956] 2 Lloyd's Rep. 651.....	500
Kirmani v. Captain Cook Cruises Pty. Ltd., (1985) 59 A.L.J. 265.....	104, 134, 459, 622
Kong Magnus, The [1891] P. 223.....	413
Kropp v. Cobb & Co. Ltd. (1962) 36 A.L.J.R. 205.....	108
Kum and Another v. Wah Tat Bank Ltd. and Another [1971] 1 Lloyd's Rep. 439.....	430
Kurrara, The (1889) 10 N.S.W. R. 1.....	68

Ladbroke v. Cricket, (1788) 2 T.R. 648.....	10
"Lady Franklin", Re The (1874) 5 A.J.R. 185.....	397
Lady, The of The Lake (1870) L.R. 3 A. & E. 29.....	557
Lambert v. Aeratee 1 Raym. Id. 233.....	7
Larsen v. The Ship "Nieuw Holland" [1957] St. R. Qd. 606.....	587
Leather's Best v. S.S. Mormaclynx [1971] A.M.C. 2383.....	424
Ledesco Uno, The [1978] 2 Lloyd's Rep. 99.....	609
Leesh River Tea Company Ltd. and Others v. British India S.N. Co. Ltd. [1966] 2 Lloyd's Rep. 195.....	251
"Le Janet" (1872) L.R. 3 Ad. & Ecc. 559.....	22
Le Loir v. Bristow (1815) 171 E.R. 43.....	21
Lemington, The (1874) 2 Asp. Mar. Law Cas. 475.....	383
Leobord, The [1962] 2 Lloyd's Rep. 146.....	592
Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705.....	470, 473
Le Mesurier v. Connor (1929) 42 C.L.R. 481.....	128
Lewmarine Pty. Ltd. v. The Ship "Kaptayanni" [1974] V.R. 465.....	318, 319, 320, 534, 593
Linda Flor, The (1857) Swab. 309; 6 W.R. 197.....	399
Liosatos v. The Australian National Line (1964) 111 C.L.R. 282.....	345, 348
Liverpool Borough Bank, The v. Turner (1860-1861) 30 L.J. Ch. (N.S.) 379.....	177, 541
Lloyds, The (1863) 32 L.J.P. & A. 197.....	104
"Loon Chong", The [1982] 1 M.L.J. 212.....	612
Lord (S.S.) (Owners) v. Newsum Sons and Co. Ltd. [1920] 1 K.B. 846.....	574
Louis Dreyfus & Co. v. Tempus Shipping Co. [1931] A.C. 726.....	465
Louise Roth, The [1905] S.A.L.R. 107.....	343, 530, 597
Lowry v. Huddart Parker Ltd. (1942) 42 S.R. (N.S.W.) 62.....	286
Lyons-In re Wilsons, Ex Parte (1839) 1 Legge 140.....	38
Lyons v. Elyard (1846) 1 Legge 328.....	35, 518
Macdonald v. Levy (1833) 1 Legge 38.....	37
Macgregor, The - Heselton's Claim, (1876) 14 S.C.R. (N.S.W.) 107.....	525, 526
Magdalen, The (1861) 5 L.T. 807.....	366
Magery, The [1902] P. 157.....	360
Maitland, The (1829) 2 Hag. Adm. 253.....	23
Malton v. Nesbitt (1824) Hil. Term 4 Geo. IV 70.....	32
Margaret, The (1881) 6 P.D. 76.....	567
Margarine Union G.m.b.H. v. Cambay Prince Co. Ltd. [1969] 1 Q.B. 219.....	579, 628
Maritime Services Board of New South Wales v. Posiden Navigation Incorporated; Maritime Services Board of New South Wales v. Liberian Cross Transports Incorporated [1972] 1 N.S.W.L.R. 72.....	224
Markwell v. Markwell Fisheries Pty. Ltd. (No. 1937 of 1978: unreported).....	496
Martha 1 Lush. 314.....	526
Mary Ann, The (1865) L.R. 7 A. & E. 8.....	338, 339
Mary Campbell, The (1871) 10 S.C.R. (N.S.W.) 261.....	522
Mary Seward v. Vera Cruz (1884) L.R. 10 C.P. 59..	277, 541
Matthews, Ex Part (1751) 2 Ves. Sen. 272.....	170
Maxine Footwear Co. v. Canadian Government Merchant Marine [1950] 2 Lloyd's Rep. 105.....	464, 466-467
McArthur v. Cheverton (1907) Tas. L.R. 89.....	70
McArthur v. Williams (1936) 55 C.L.R. 324.....	55, 102
McDougall v. Aeromarine of Ensworth Ltd. [1958] 3 All E.R. 431.....	594

McKelvey v. Meagher (1906) 4 C.L.R. 265.....	102
McKenny v. State Government Insurance Office (Queensland) (1972) Q.J.P.R. 138..	290
McKenzie v. William Holyman & Sons Pty. Ltd. (1939) 13 A.L.J. 73. ....	284
McFadden v. Blue Star Line [1905] 1 K.B. 697.....	383
McLachlan v. Service (1871) 2 V.L.R. 198.....	265
McIlwraith McEacharn Ltd. v. The Shell Company.....	47, 105, 451
of Australia Ltd. (1945) 70 C.L.R. 175	532, 534, 535
McLean, Ex parte (1930) 43 C.L.R. 472.....	130, 569
Medley, In re (1902) 28 V.L.R. 475.....	111
Mecca, The [1895] P. 95, P. 112.....	316
Mellish v. Motteux, (1811) Peak. 156. ....	4
Mersey Docks and Harbour Board v. Hay [1923] A.C. 345.....	401
Mestair v. Gillespie (1804-1805) 11 Ves. Jun. 622.....	4, 171
"Mihalis", The [1984] 2 Lloyd's Rep. 525.....	242
Miller Steamship Co. Ltd. v. Overseas Tankship (U.K.) [1963] 1 Lloyd's Rep. 402.....	218
Minnehaha, The (1861) Lush. 335.....	364
Minerva (1825) 1 Hag. Adm. 347.....	20
Minerva, The [1933] P. 224.....	580
Mintara and The Wairuna, The (1909) 9 S.R. (N.S.W.) 97.....	391
Mitchell, Cotts v. Steel [1916] 2 K.B. 610, p. 614.....	540
Moliere, The [1925] P. 27.....	327, 571
"Molly" The (1814) 1 Dodds 394; 165 E.R. 1354.....	166
Monica S., The [1967] 3 All E.R. 740.....	296
Monkhouse, Wright and Fairbairn v. Hay (1820) 8 Price 256.....	166
Monica, The [1967] 3 All E.R. 740.....	610, 614
Mons., The (1932) 43 Ll. L. Rep. 151.....	400
Monte Ulia (Owners) v. Banco and Others (Owners) [1971] P. 137.....	567, 614
Mors v. Sluce (1793) 1 Mod. Rep. 85.....	12
Moss v. Charnock (1802) 2 East 399.....	156, 157
Mulgrave (1827) 2 Hag. Adm. 77.....	15
Mulvey v. The Barge "Neosho" [1919] 47 D.L.R. 437.....	279
Municipality of Pictou v. Geldert [1893] A.C. 524.....	30
Nagrint v. The Ship Regis (1939) 61 C.L.R. 688.....	
National Defender, The [1970] 1 Lloyd's Rep. 40.....	286, 278, 279
Nautik, The [1895] P. 121.....	358
Nelly Schneider, The (1878) 3 P.D. 152.....	564
Nelson v. Mutton (1934) 8 A.L.J. 30.....	555
Neptune, The (1824) 1 Hag. Adm. 225.....	282
Neptune, The (1835) III Knapp 95.....	22, 52, 359
Neptune, The I Knapp's P.C. Cases 94.....	3, 23, 24
Newcastle and Hunter River Steamship Co. Ltd. and Others, v. The Attorney-General for the Commonwealth and Another (1921) 29 C.L.R. 357....	315
Newman & Dale v. Lamport & Holt [1896] 1 Q.B. 20.....	106, 124, 126
Newman v. Walters (1804) 3 Bos. & Pul. 613.....	595
New Pheonix, The (1823) 1 Hag. Adm. 198.....	14
New South Wales v. The Commonwealth (1976) 50 A.L.J.R. 218.....	21
	92, 131, 186, 376

Nicaraguan Barque Courier, The (1879)	
13 S.A.L.R. 124.....	523, 524, 539, 554
Niceto de Larrinaga, The [1965] 2 All E.R. 930.....	414
Nicholas, Ex parte (1839) 1 Legge 123.....	28, 88
Nichols v. Marsland 91875) L.R. 10 Ex. 255.....	250
Nicholson v. Leth Salvage and Towage Co. Ltd	
[1923] S.L.T. 229.....	364
Nina, The (1867) L.R. 2 P.C. 38.....	528
North Brisbane Finance and Insurances Pty. Ltd., Re	
(1983) 8 A.C.L.R. 274.....	135, 176, 197
Norh Coast Steam Navigation Co. v. The Ship "Eugene"	
(1909) 9 N.S.W.L.R. 246.....	581
Northern Fishing Co. (Hull) Ltd. v. Eddom, The Norman	
[1960] 1 Lloyd's Rep. 1.....	474
Northumbria, The (1870) 21 L.T. (N.S.) 681.....	495
Obey, The (1866) 12 Jur. (N.S.) 817.....	479
Ocean Queen, The (1879) 1 N.S.W.R. 99.....	517, 527
Odysseus III, D.C. Fla., The (1948) 77 F. Supp. 297.....	403
Onward, The (1873) 42 L.J. Adm. 61.....	313
Oriente, The [1895] P.49.....	341
Oriental, The (1851) 7 Moo. P.C.C. 398.....	396
Orr v. Dickinson (1859) 28 L.J. Ch. (N.S.) 516.....	161
O'Sullivan v. Noarlunga Meat Ltd.	
(1954) 92 C.L.R. 562.....	130
Oteri v. The Queen [1977] 1 Lloyd's Rep. 105 (P.C.).....	185
Outhouse v. The "Thorshaun" [1935] 4 D.L.R. 628.....	218, 566
Owners of the S.S. Kalibia, The v. Alexander Wilson	
(1910) 11 C.L.R. 689.....	123, 128, 281
Owners of S.S. Melanie v. Owners of S.S. San Onofre	
[1925] A.C. 246.....	368
Owners of S.S. Utopia v. Owners of S.S. Primula -	
The Utopia, [1893] A.C. 492.....	300-301
Overseas Tankship (U.K.) Ltd. v. Morts Dock &	
Engineering Co. Ltd. [1961] A.C. 388 (P.C.).....	202
Overseas Tankship (U.K.) Ltd. v. The Miller	
Steamship Co. Pty. and Another [1967] A.C. 617 (P.C.).....	208
Padfield v. Minister of Agriculture, Fisheries	
and Food [1968] A.C. 997.....	247
Palmer v. Moxon (1813) 2 M. & S. 43.....	156
"Pangkalan Susu Permina 3001", The [1977] 1 M.L.J. 141.....	612
Paterson v. Knight (1849) 1 Legge 496.....	35
Patridge, The (1822) 1 Hag. Adm. 81.....	5
Paul & Gray Ltd. v. The Ship "Amy Turner"	
(1922) V.L.R. 740.....	335
Pearce v. Florence [1976] A.L.R. 289.....	376
Percy, The (1837) 3 Hag. Adm. 402.....	557
Perla, The (1858) Swab. 353.....	321, 526
"Permina 108", The [1977] 1 M.L.J. 49.....	609
"Permina Samudra XIV", The [1977] 1 M.L.J. 47.....	616
Petone, The [1917] P. 198.....	342, 416
Phillips (app.) v. Born (resp.) (1906) 93 L.T. 634.....	104
Pirie & Co. v. Middle Dock Co. (1881) 44 L.T. 426.....	590
Pittman v. Home Owners' Loan Corporation (1939) 308 U.S. 21.....	128
Polish Steam Ship Co. v. Atlantic Maritime Co.	
and Others (The Garden City) [1984] 3 All E.R. 59.....	493
Portsea, The (1827) 2 Hag. Adm. 84.....	32, 557
Primary Industries Corp'n. v. Barber Lines A/S and	
Skilos Tropic [1975] 1 Lloyd's Rep. 461.....	423

Providence, The (1825) 1 Hag. Adm. 391.....	19
Pugh v. Duke of Leeds (1777) 2 Cowp. 714.....	319
Quan Yik v. Hinds (1905) 2 C.L.R. 345.....	29, 39
Queen Eleanor, The (1899) 18 N.Z.L.R. 78 .....	277
Queen v. Shea, The [1978] 1 S.A.S.R. 591.....	185
Queen on the Prosecution of The Pacific Steam Navigation Company, The v. Elias Arnawld and Thomas Powell (1847) 16 L.J.Q.B. (N.S.) 50.....	148
Queen of the South, The [1968] P. 449.....	586, 604
Quickstep, The (1890) 15 P.D. 196.....	483-484
R. v. Commissioner for Transport; Ex parte Cobb & Co. Ltd. [1963] Qd. R. 547.....	102, 107, 113
R. v. Gordon-Finlayson [1941] 1 K.B. 171.....	140
Radcliffe v. Howard Smith Ltd. [1948] S.A.S.R. 133.....	286
"Rajah of Cochin", The (1859) Swab. 474.....	336
Rainger (1827) 2 Hag. Adm. 42.....	15
Ran; The, The Graygarth [1922] P.80.....	485
Rederij Erven H. Groen and Groen v. The England (Owners) [1973] 1 Lloyd's Rep. 373.....	475
Rex v. Farrell, Dingle and Woodward (1831) 1 Legge 5.....	29, 38
Rex v. Mason and Another (1904) 6 W.A.R. 134.....	94
Rhind v. The "Zita" (1924) Gaz. L.R. (N.Z.) 7.....	330, 342, 416
Rich v. Coe et. al (1777) 2 Cowp. 635.....	9
Ringdove, The, 11 P.D. 120.....	339
Riga, The (1872) L.R. 3A. & E. 516.....	320, 526
Riley v. Ampol Petroleum Ltd. [1972] 23 F.L.R. 351.....	287
Rio Tinto Co. v. Seed Shipping Co. (1926) 24 Ll.L.R. 316.....	430
Ripon City, The [1897] P.226.....	329, 330, 341, 351, 398
Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. [1961] A.C. 807.....	464
Rivtow Marine Ltd. v. Washington Iron Works (1973) 40 D.L.R. (3d.) 540.....	217
Robinson v. Macdonnell (1816) 5 Maule & Selw. 228.....	165-166
Robinson v. Thompson (1687) 1 Vern 466.....	6
Robinson v. Western Australian Museum (1977-78) 16 A.L.R. 623.....	375, 377
Rochester v. The Garden City [1908] A.C. 458.....	326
Rocker v. Busher 1 Starke 26.....	8
Rogers v. Loutit (1881) S.A.L.R. 4.....	81, 264
Rose, The (1873) L.R. 4 A. & E. 6.....	178
Rosenfield Hillas & Co. Pty. Ltd. v. The Ship Fort Loramie, (1922) 31 C.L.R. 56.....	300
Royal Arch, The (1857) Swab. 269, 281.....	395
Royal Wells, The [1984] 3 All E.R. 193.....	350
Rusden v. Pope (1868) L.R. 3 Ex. 269.....	577
Ryan v. Selkirk (1955) 3 W.C.B.D. (Vic.) 227.....	291
Rylands v. Fletcher (1866) L.R. 1 Ex. 265.....	217
Sabina, The (1842) 7 Jur. 182.....	400
Salacia (1829) 2 Hag. Adm. 262.....	13
Salacia, The (1862) 167 E.R. 193.....	350
Saloman v. Salomon & Co. Ltd. [1897] A.C. 22.....	149
"San Bernardo", The (1799) 1 C. Rob. 177.....	14
Sansum v. Bragginton (1750) Ves. Sen. Supp. 189.....	9, 10
"Sappho", The (1871) L.R. 3 P.C. 690.....	359, 360



"Sara", The 12 P.D. 158.....	339
"Sara", The 14 App. Cas. 209.....	343
"Satanita", The [1897] A.C. 59.....	498, 500
Scaramanga v. Stamp (1880) 5 C.P.D. 295.....	430
Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., C.A. Cal. (1962) 306 F. 2d. 188.....	403
Schlederer v. The Ship Red Fin [1979] 1 N.S.W.L.R. 258.....	394
Schneider v. Health (1813) 170 E.R. 1462.....	5
Scruttons Ltd. v. Midland Silicones Ltd. [1962] 1 All E.R. 1.....	453
Searle v. Lindsay (1861) 11 C.B. (N.S.) 428, 439.....	266
Sedgworth v. Overend 7 T.R. 278.....	16
S.C.M. (U.K.) Ltd. v. W.J. Whittall & Son Ltd. [1970] 3 All E.R. 245.....	578
Sept Iles Express Inc. v. Trembley [1964] Ex. C.R. 213.....	425
Setterfield, Ex parte (1900) 17 W.N. 174.....	97
Shell Oil Company v. The Ship "Lastrigoni" [1974] 48 A.L.J.R. 295.....	322, 593
Ship Loretta, The v. Bubb [1971] 18 F.L.R. 141.....	548
Ship "Marlborough Hill", The v. Alex, Cowan and Sons Ltd. [1921] 1 A.C.....	444, 586
Ship "Strandhill", The v. Walter Hodder Company [1926] S.C.R. 680.....	410
Silver v. Ocean S.S. Co. [1930] 1 K.B. 416.....	235, 585
Sir John Jackson, Limited, The Hopper No. 66, v. Owners of the Steamship "Blanche", Her Master and Crew, and Others [1908] A.C. 126.....	450
Slater v. Willis (1838) 1 Beav. 354.....	152-153
Smith v. Great Western Ry. Co. (1925) 135 L.T. 112.....	206
Smith v. Plummur (1818) 1 B. & Ald. 575, 582.....	340
Smith v. Wright (1861) 6 H. & N. 821.....	259
Societa Anonima U.A.M. v. Hamburg S.A. S.S. Co. (1912) 106 L.T. 957.....	595
Societe Anonyme de R.A. Helice v. Bennetts [1911] 1 K.B. 243.....	579
Spaight v. Tedcastle 6 A.C. 217.....	391
Spiratos v. Australasian United Steam Navigation Co. Ltd. (1955) 29 A.L.J. 376.....	283
Spirit of the Ocean, The (1865) 12 L.T. (N.S.) 239.....	463
S.S. Pacific Star v. Bank of America National Trust and Savings Association [1965] W.A.R. 159.....	564
St. Cloud, The (1863) Br. & Lush 4, 14; 167 E.R. 269.....	297
St. Elefterio, The [1957] P. 179.....	585, 608, 628
St. George, The [1926] P. 217.....	398
St. Merriel, The [1963] P. 247.....	560, 606, 611, 613
Standard Oil Co. of New York v. Clan Line Steamers Ltd. [1924] A.C. 100.....	478
Staples v. Stephens (1883) S.A.L.R. 131.....	81
Stapleton v. Haymen (1864) 33 L.J. Ex. 170.....	326
Steamship MacGregor-Heselton's Claim, The (1876) 14 N.S.W.L.R. 107.....	364
Stodgroom, Ex parte (1790) 2 Cox 234.....	3
State Government Insurance Commission v. Trigwell and Others (1978) 142 C.L.R. 617.....	28, 37
State Government Insurance v. Trigwell and Others (1978) 142 C.L.R. 617.....	30
Stokes and Others v. The Conference (1887) 8 N.S.W.R. 10.....	526, 599
Stone No 1 (Owners) v. Manchester Ship Canal Co. and Others [1956] A.C. 1.....	501

Straker v. Hartland (1865) 11 L.T. (N.S.) 622, 623.....	495
Strang v. Scott (1889) 14 A.C. 601.....	591
Strelly v. Wenson 1 Vern 298; [1] Eq. Ca. Ab. 7, plo. 12, 372, pl. 1.....	6
Suisse Atlantique S.A.M.S.N. v. Rotterdamsche K.C. [1967] 2 All. E.R. 61.....	305
Sutton v. Buck 91810) 2 Taunt 302; 127 E.R. 1094.....	166
Suzuki v. Beynon (1926) 42 T.L.R. 269, 274.....	383
Svenssons v. Cliffe S.S. Co. [1932] 1 K.B. 490.....	574
Swift, The [1901] P. 168.....	566
Swift & Co. Ltd. v. The Ship S.S. "Heranger" (1965) 82 W.N. (Pt. 1) (N.S.W.) 540.....	535
Sylvan Arrow, The [1923] P. 220.....	385
Sze Hai Tong Bank v. Rambler Cycle Co. [1957] 3 All E.R. 182.....	430
Tagus, The [1903] P. 44.....	408
Tasmania, The (1888) 13 P.D. 110.....	384
Taubman v. Pacific S.N. Co. (1872) 26 L.T. 704.....	305
Tergeste, The [1903] P. 26.....	595, 602
Tervaete, The [1922] P. 259.....	388, 415, 518
Texas and Gulf SS. Co. v. Parker (1920) 263 Fed. Rep. 864.....	383
Thefta, The [1894] P. 280.....	279, 571
Thomson v. Leake 1 Mad. Rep. 395.....	171
Thomas National Transport (Melbourne) Pty. Ltd. v. May and Baker (Aust.) Pty. Ltd. 40 A.L.J.R. 189.....	430
Thompson v. Finden (1829) 172 E.R. 651.....	13
Tillet v. Ward (1882) 10 Q.B.D. 17.....	207
Tojo Maru, The [1971] 1 All E.R. 1110.....	366, 367, 504, 575, 584
Tolten, The [1946] P. 135 (C.A.).....	329, 379, 387
Train v. Bennett (1827) 172 E.R. 296.....	19
Tranter v. Watson (1703) 2 Id. Raym. 931.....	352
Transmarine Barge, The No. 100, C.C.A., N.Y. (1932) 62 F. 2d. 252.....	403
Trident, The 1 W. Rob., pp. 29, 31.....	6
Trimble v. Hill (1879) 5 App. Cas. 342, p. 345.....	31
Troilus, The [1951] A.C. 820.....	356
Trow v. Ind. Coope (West Midlands) Ltd. [1967] 2 All E.R. 900....	610
Truculent, The [1952] P.1.....	472
Tubantia, The [1924] P. 78.....	353, 610
Tucker v. Alexandroff (1902) 183 U.S. 424.....	331
Tucker v. Riverside Coal Transport Pty Ltd., ex parte Tucker [1982] Qd. R. 181.....	228
Turgot, The (1886) 11 P.D. 21.....	593
Two Ellens L.R. 4 P.C. 161.....	524
"Two Friends" (1799) 1 C. Rob. 271, 277.....	353, 370
Tyburnia, The (1887) 4 W.N. (N.S.W.) 1.....	350
Union Bank of London, The v. Lenanton (1878) 47 L.J. 47 L.J. (N.S.) 409.....	167
Union of India v. N.V. Reederij Amsterdam [1963] 2 Lloyd's Rep. 223.....	464
Union Steamship Co. of New Zealand Ltd. v. The Commonwealth (1925) C.L.R. 130.....	93, 119, 130
Union Steamship Company of New Zealand v. Ferguson (1967-1969) 119 C.L.R. 191.....	286, 548
United States of America v. Republic of China (1950) Q.S.C.R. 6.....	389

United States of America, Owners of the Western Maid v. Auxiliary Schooner Liberty and Steamship Carolinian (Unreported case); see The Tervaete [1922] P. 259..259, 261 Universo Insurance Co. of Milan v. Merchants Marine Insurance Co. (1897) 1 Q.B. 205.....600 Utopia, The [1893] A.C. 492.....384, 385 Upnor (1826) 2 Hag. Adm. 3.....15
 "Vera Cruz", The (1884) 9 P.D. 96.....219, 277 "Vera Cruz", The (1884) L.R. 10 C.P. 59.....570 Veritas, The [1901] P. 304.....399 Verren v. Anglo-Dutch Brick Co. (1924) 34 Ll. L. R. 210.....430 Victoria, The (1887) 12 P.D. 105.....588, 597 Victoria v. The Commonwealth (1937) 58 C.L.R. 618.....129 Victorian Steam Navigation Board, Ex parte Allan, In re (1881) 7 V.L.R. 248.....95 Vigilant, The [1921] P. 312.....383, 574 Vine (1825) 2 Hag. Adm. 1.....15 Virginia Carolina Chemical Co. v. Norfolk and North American Shipping Co. [1912] 1 K.B. 229.....499 Virginia Carolina Co. v. Norfolk S.S. Co. [1912] 1 K.B. 229.....465
 Wagon Mound (No. 1) [1961] A.C. 388.....212, 217, 255, 388 Wagon Mound (No. 2) [1967] A.C. 617.....212, 579 Wallace v. Hitchins A Beckett's Reserved Judgment Williams Practice Cases (1846-51).....44 Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society (1934) 50 C.L.R. 581.....407 Waghorn v. Waghorn (1941-1942) 65 C.L.R. 289.....21 Warkworth, The (1884) 9 P.D. 20.....383, 573 "Warrior", The (1862) Lush. 481.....22, 369 Watanga, The (1856) Sw. 165; 166 E.R. 1075.....317 "Waterloo" (1820) 2 Dodds 432.....15, 359 Watkinson v. Barnardiston 2 Wm. 367.....8 Webster v. Seekamp (1821) 4 Barn & Ald. 352.....320, 526 Wells v. Osmand (1704) 2 Raym 1044.....330, 332 Western Transport Pty. Ltd. v. Kropp (1964) 38 A.L.J.R. 237.....108, 124 Westport, The [1966] 1 Lloyd's Rep. 342.....598 West Friestland, The Swa. 454.....316 White v. McLean (1890) 25 S.A.L.R. 97.....60 White v. Wilson 2 Bos. & Pul. 116.....18 Wild Ranger, The (1863) Br. & L. 84; 7 L.T. Rep. (N.S.) 725.....416, 455 Wilkins and Others v. Carmichael (1779) 1 Doug. 102, 105.....333 William v. Allsupp (1861) 30 L.J.C.P. 353.....577 William Holyman & Sons v. Eyles [1947] Tas. S.R. 11.....186 Williams Holyman & Sons Pty. Ltd. v. The Marine Board of Launceston (1929) 24 Tas. L.R. 64.....484 William Holyman & Sons Pty. Ltd. v. Foy & Gibson Pty. Ltd. (1945) 73 C.L.R. 622 .....424 Wilson v. Dickson (1818) 106 E.R. 268.....480, 481 Wilson v. Wilson (1872) L.R. 14 Eq. 32.....561 Wilsons and Clyde Coal Co. v. English [1938] A.C. 57., 86.....266-267, 274 Winestead, The [1895] P. 170.....105 "Woodrop-Sims" (1815) 2 Dodds. 82.....16, 17, 67

Woods v. Duncan [1946] A.C. 401.....	212
Woodward v. Bonithan, Sir Thomas Raym 3.....	332
Wyman v. The "Duart Castle" (1899) 6 Can. Ex. C. 387.....	278
Yallop, Ex parte (1808) 15 Ves. Jun. 60.....	150-151, 170
Ybasco v. Dakas and Dakas [1948] 51 W.A.L.R. 22.....	149
Young v. Alexander and Dunbar (1806) 8 East 10.....	163
Yuri Maru, The Woron, The [1927] A.C. 906.....	297, 531, 549
Zephyr (1827) 2 Hag. Adm. 43.....	15
Zigurds, The [1932] P. 113.....	403
Zodiac, The (1825) 1 Hag. Adm. 320.....	11
Zolverein, The (1856) 2 Jur. (N.S.) 429.....	8

## Table of Statutes

(In chronological order. Abbreviated titles given  
in brackets to certain statutes.)

## UNITED KINGDOM

(Statute applied, applies or would probably have application,  
to Australia when "(Imp.)" included.)

	Page
1734 (Responsibility of Shipowners Act) (Imp.)	
(7 Geo. II, c. 15).....	442, 448, 507
s. 21.....	462
1746 (Protection of Creditors Act) (Imp.)	
(19 Geo. II, c. 32) s. 2.....	41
1786 (Registration/Registry Act) (Imp.)	
(26 Geo. III, c. 60).....	4
1786 (Responsibility of Shipowners Act) (Imp.)	
(26 Geo. III, c. 86).....	442, 443, 448
s. 1.....	462
s. 4.....	39
1794 (Registration/Registry Act) (Imp.)	
(34 Geo. III, c. 68).....	4, 150
s. 15.....	163
1806 Merchant Shipping Act (6 Edw. 7, c. 48).....	47
1813 (Responsibility of Shipowners Act) (Imp.)	
(53 Geo. III, c. 159).....	442, 443, 448
s. 1.....	481
s. 7.....	39
s. 8.....	481
s. 10.....	481
s. 13.....	494
1819 Foreign Enlistment Act (59 Geo. III, c. 69), s. 7 (2).....	147
1823 (Registration/Registry Act) (Imp.)	
(4 Geo. IV, c. 41).....	41, 152, 179
s. 31.....	146
s. 37.....	171
1823 New South Wales Act (Imp.) (Geo. IV, c. 96)	
s. 4.....	49
s. 9.....	49
1825 (Registration/Registry Act) (Imp.)	
(6 Geo. IV, c. 110).....	172
s. 39.....	159
1825 Bubble Repeal Act (Imp.) (6 Geo. IV, c. 91).....	145, 146
1828 Australian Courts Act (Imp.)	
(4 Geo. IV, c. 83).....	17, 33, 34, 35, 38, 42, 44 46, 87, 354, 380, 391, 448
s. 24.....	38, 88
1832 Supreme Court (Admiralty) Act (Imp.) s. 6	
(2 Williams IV, c. 51).....	43, 44, 354, 509
s. 4.....	36
s. 6.....	511, 516
1833 (Registration/Registry Act) (Imp.)	
(3 & 4 Wills, c. 55).....	179
s. 36.....	173
1834 Trading Companies Act (4 & 5 Will. IV, c. 94).....	146
1840 Admiralty Court Act.....	317, 510, 523, 525, 531
(3 & 4 Vict., c. 65).....	537, 548, 549, 556, 592
s. 4.....	549, 554
s. 6.....	25, 315, 316, 321, 524, 528, 580, 581, 599
1844 Merchant Shipping Act (Imp.)	
(7 & 8 Vic., c. 112), s. 16.....	334

1844	Joint Stock Companies Registration and Regulation Act (7 & 8 Vic., cc. 110 and 111).....	146, 441
1845	(Registration/Registry Act) (Imp.) (8 & 9 Vic., c. 89).....	44, 180
	s. 5.....	146
	s. 12.....	146
	s. 13 (1).....	146
	s. 37.....	153
1846	Wreck and Salvage Act (Imp.) (9 & 10 Vic., c. 99).....	581, 582
	s. 40.....	581
1846	Lord Campbell's Act (9 & 10 Vic., c. 93).....	277, 542
1849	Admiralty Offences (Colonial) Act (12 & 13 Vic., c. 96).....	185
1850	Piracy Act (Imp.) (13 & 14 Vic., c. 26).....	34
1850	Mercantile Marine Act (Imp.) (13 & 14 Vic., c. 93) s. 121.....	53
1854	Merchant Shipping Act (Imp.) (17 & 18 Vic., c. 104).....	47, 54, 88, 89, 94, 145 160, 162, 176, 333, 334 339, 380, 447, 462, 514 521, 522, 538, 545, 546 547, 558, 582, 583
	s. 17.....	141
	s. 43.....	154
	s. 62.....	538
	s. 64.....	538
	s. 65.....	538
	s. 81.....	161
	s. 109.....	86
	s. 141.....	54
	s. 143.....	54
	s. 145.....	54
	s. 182.....	349
	s. 189.....	509
	s. 191.....	338, 509, 522
	s. 209.....	336, 345
	s. 240.....	509, 549, 554
	s. 242.....	96
	s. 242 (5).....	94, 95
	s. 291.....	99
	s. 376.....	105
	s. 379.....	105
	s. 458.....	582
	s. 459.....	582
	s. 486.....	509
	s. 490.....	509
	s. 504.....	444, 446, 463, 480, 489
	s. 505.....	482
	s. 547.....	101, 112, 387
	Part II.....	180, 195, 337, 519
	Part III.....	62, 70
	Part IV.....	86
	Part IX.....	444, 448
1855	Limited Liability Act (Imp.) (18 & 19 Vic., c. 133).....	441, 442, 444
1855	Bills of Lading Act (18 & 19 Vic., c. 111).....	300, 303, 304
1858	Mercy Docks Acts Consolidation Act (21 & 22 Vic., c. 92).....	401
1860	Admiralty Offences (Colonial) Act (Imp.)	

	(23 & 24 Vic., c. 122).....	185
1861	Admiralty Court Act (Imp.)	
	(24 Vic., c. 10).....	218, 252, 276, 308
		317, 327, 339, 510
		520, 524, 556
	s. 4.....	317, 593
	s. 5.....	326, 593, 328, 550, 529
	s. 6.....	296, 301, 304, 311, 422, 430, 527, 586, 587
	s. 8.....	554, 555, 556
	s. 9.....	583
	s. 11.....	545, 546, 547, 558
	s. 35.....	547
1862	Merchant Shipping Act Amendment Act (Imp.)	
	(25 & 26 Vic., c. 63).....	67, 446, 482
	s. 3.....	155, 159, 541
	s. 23.....	96
	s. 23 (1).....	95
	s. 29.....	99
	s. 32.....	76
	s. 54.....	446, 458, 479, 498
1863	Vice-Admiralty Courts Act (Imp.)	
	(26 & 27 Vic., c. 24).....	35, 48, 509, 519, 520, 521
		525, 531, 537, 582
	s. 10.....	523, 524, 525, 526
	s. 10 (2).....	527, 597
	s. 10 (3).....	592
	s. 10 (10).....	529
	s. 12.....	521
	s. 22.....	521, 532
1865	Colonial Laws Validity Act (Imp.)	
	(28 & 29 Vic., c. 63).....	46, 118, 120, 121, 122, 450
	s. 1.....	448
	s. 2.....	49, 90, 99, 101, 197
	s. 2 (1).....	120
1867	Vice-Admiralty Courts Act Amendment Act (Imp.)	
	(30 & 31 Vic., c. 45).....	48, 509, 520, 531, 537
1867	Merchant Shipping Act (Imp.) (30 & 31 Vic., c. 45).....	271, 520
1868	County Courts Admiralty Jurisdiction Act	
	(32 & 33 Vic., c. 51).....	299
	s. 2.....	550
	s. 6.....	299
	s. 7.....	299
	s. 8.....	299
1869	Merchant Shipping (Colonial) Act (Imp.)	
	(32 & 33 Vic., c. 11), s. 4.....	90, 104
1869	County Courts Admiralty Jurisdiction Amendment Act (32 & 33 Vic., c. 51)	
	s. 2.....	550, 551, 587
1873	Supreme Court of Judicature Act	
	(36 & 37 Vic., c. 66).....	317, 536
	s. 17.....	89
	s. 33.....	99
1873	Merchant Shipping Act (Imp.) (36 & 37 Vic., 85)	
	s. 2.....	99
	s. 17.....	99
1876	Merchant Shipping Act (Imp.) (39 & 40 Vic., c. 80)	
	s. 5.....	270

1878	Bills of Sale Act (41 & 42 Vic., c. 31)	
	s. 4.....	193
1882	Merchant Shipping (Colonial Inquiries) Act	
	(Imp.) (45 & 46 Vic., c. 76).....	97
1883	Judicature Act (46 & 47 Vic., 29).....	391
1889	Merchant Shipping Act (Imp.).....	339
	s. 1.....	397, 530, 598
1889	Interpretation Act (Imp.)	
	(52 & 53 Vic., c. 63).....	102
	s. 1 (1) (b).....	522
	s. 18 (2).....	55, 102, 105, 533
	s. 30.....	449
	s. 38 (1).....	583
	s. 38 (2).....	541
1890	Colonial Courts of Admiralty Act (Imp.)	
	(53 & 54 Vic., c. 27) .....	48, 252, 254, 276, 297
		509, 531, 532, 534, 535
		536, 537, 544, 548, 582
		604
	s. 2.....	531, 550
	s. 2 (1).....	380, 533
	s. 2 (2).....	300, 537
	s. 2 (3) (a).....	297, 394
	s. 2 (4).....	548
	s. 3.....	537
	s. 4.....	533
	s. 7.....	534, 535
	s. 9 (1).....	532
	s. 16 (1) (a).....	531
1894	Colonial Acts Confirmation Acts (Imp.)	
	(56 & 57 Vic., c. 72).....	91, 107, 112
1894	Merchant Shipping Act (Imp.)	
	(57 & 58 Vic., c. 60).....	47, 54, 66, 76, 83, 88, 93
		105, 117, 118, 120, 122, 160
		185, 187, 193, 195, 199, 271
		288, 334, 343, 380, 449, 450
		456, 462, 464, 465, 467, 498
		507, 510, 546, 557, 583
Part I.....		135, 181, 195, 541, 545, 546
	s. 2.....	452
	s. 5 (1).....	152, 271
	s. 17.....	519
	s. 20.....	160
	s. 22 (1) (ix).....	551
	s. 30.....	195, 554
	s. 33.....	176, 196
	s. 34.....	559
	s. 35.....	559
	s. 36.....	196, 198
	s. 57.....	178, 541, 553
	s. 71.....	544
	s. 91.....	141, 519
Part II.....		65, 91, 343, 515
	s. 156.....	369
	s. 158.....	336
	s. 167.....	341, 530
	s. 167 (1).....	340, 350, 397
	s. 167 (2).....	343
	s. 221.....	134
	s. 222.....	134



	s. 261.....	86, 271
	s. 264.....	55
Part V		
	s. 419.....	100, 101, 103, 392
	s. 449.....	539
	s. 458 (1).....	271
Part VI		
	s. 470.....	98
	s. 472.....	539, 549, 554
	s. 478.....	97, 133
Part VIII	.....	451, 452, 460, 462, 476, 483, 546, 547
	s. 104 (3).....	459
	s. 502.....	463, 465, 466, 467, 468, 480
	s. 503.....	135, 441, 447, 448, 449, 454
		457, 459, 460, 467, 468, 477
		480, 487, 489, 500, 574, 612
	s. 504.....	448, 477, 497, 612
Part IX		
	s. 513.....	606
	s. 544 (3).....	582
	s. 554.....	415
	s. 554 (1).....	354, 370, 582
	s. 554 (3).....	365
Part XI	.....	250
Part XIV		
	s. 692.....	293
	s. 735.....	90, 91, 102, 111, 112
		115, 116, 118, 120, 122, 337
	s. 736.....	90, 91, 104, 106, 107, 108
		109, 116, 118, 122, 337, 343
	s. 741.....	164, 454
	s. 742.....	342, 452
1898 Merchant Shipping (Liability of Shipowners)		
	Act (Imp.) (61 & 62 Vic., c. 14) s. 1.....	47, 447, 452
1900 Merchant Shipping (Liability of Shipowners and Others)		
	Act (Imp.) (63 & 64 Vic., c. 32).....	449
	s. 1.....	48, 448, 501, 576
	s. 2 (2).....	447
	s. 3.....	47, 447, 501
	s. 4.....	48
1900 Commonwealth of Australia Constitution Act		
	(Imp.) (63 & 64 Vic., c. 12).....	107, 118, 258
	s. 5.....	289
	s. 51.....	618
	s. 51 (xxix).....	460
	s. 55.....	258
	s. 60.....	533
	s. 76.....	613
	s. 76 (iii).....	540
	s. 77 (iii).....	540
	s. 98.....	618
	s. 109.....	225
	s. 122.....	618
1906 Marine Insurance Act (6 Edw. VII, c. 41)		590
	s. 52.....	599
	s. 53.....	599
	s. 54.....	599
	s. 66 (1).....	590
	s. 66 (2).....	590
	s. 85.....	600

1906	Merchant Shipping Act (Imp.) (6 Edw. VII, c. 48).....	451
	s. 35 (2).....	606
	s. 42.....	606
	s. 70.....	47
	s. 71.....	47
	s. 80.....	454, 455
	s. 80 (1).....	164
	s. 85.....	452
1906	Workmen's Compensation Act (6 Edw. VII, c. 58)	
	ss 5-7.....	327
	s. 5.....	281
	s. 6.....	281
	s. 7.....	281
	s. 11.....	293
1907	Limited Partnership Act (7 Edw. VII, c. 24).....	442, 444
1911	Protection of Animals Act (1 & 2 Geo. V, c. 27).....	186
1911	Maritime Conventions Act	
	(1 & 2 Geo. V, c. 57).....	381, 391, 393, 412, 418, 542, 572
	s. 4.....	86
	s. 4 (1).....	101
	s. 8.....	354, 414
1912	Mersey Docks and Harbour Act	
	(2 & 3 Geo. V, c. 12).....	401
1920	Administration of Justice Act	
	(10 & 11 Geo. V, c. 81), s. 5 (1).....	551, 622, 625
1924	Carriage of Goods by Sea Act	
	(14 & 15 Geo. V, c. 22).....	306, 423, 464, 465, 576
	s. 6 (2).....	467
1925	Supreme Court of Judicature (Consolidation)	
	Act (15 & 16 Geo. V, c. 49).....	280
	s. 22.....	551, 622, 625
	s. 22 (2).....	551
1931	Statute of Westminster (Imp.)	
	(22 Geo. V, c. 4).....	118, 120, 534
	s. 1.....	534
	s. 2.....	120
	s. 2 (2).....	460
	s. 4.....	457
	s. 6.....	533, 535
	s. 11.....	457
1936	Manchester Ship Canal Act	
	(26 Geo. V & I Edw. VIII, c. 124).....	501
	s. 32.....	501
1939	Limitation Act ( 2 & 3 Geo. VI, c. 21), s. 2 (6).....	412
1947	Crown Proceedings Act (10 & 11 Geo. VI, c. 44).....	389
	s. 2.....	454
	s. 5.....	454, 456
	s. 5 (1).....	472
	s. 29.....	415, 583
	s. 31 (1).....	449
	s. 40 (2) (f).....	449
1948	Companies Act (11 & 12 Geo. VI, c. 38), s. 95.....	196
1948	British Nationality Act (Imp.)	
	(11 & 12 Geo. VI, c. 56), s. 1.....	185
1951	Rivers (Prevention of Pollution) Act	
	(14 & 15 Geo. VI, c. 64), s. 2 (1).....	224
1955	Oil in Navigable Waters Act	
	(3 & 4 Eliz. II, c. 25), s. 1 (1).....	225
1956	Administration of Justice Act	
	(4 & 5 Eliz. II, c. 46).....	280, 551, 552, 553, 605

	613, 614, 615, 618, 622
s. 1 (1).....	562, 604
s. 1 (1) (d).....	219, 580, 612
s. 1 (1) (e).....	220, 612
s. 1 (1) (f).....	612
s. 1 (1) (g).....	612
s. 1 (1) (h).....	241, 585, 586, 608
s. 1 (1) (i).....	612
s. 1 (1) (j).....	612
s. 1 (1) (k).....	612
s. 1 (1) (l).....	612
s. 1 (1) (m).....	612
s. 1 (1) (n).....	612
s. 1 (1) (o).....	603, 612
s. 1 (1) (p).....	597, 598, 612
s. 1 (1) (q).....	236, 598, 612
s. 1 (1) (r).....	612
s. 3 (3).....	560
s. 3 (4).....	608, 609, 612, 617
s. 3 (4) (a).....	611, 613
s. 3 (4) (b).....	611
s. 8 (1).....	586
1958 Merchant Shipping (Liability of Shipowners and Others) Act (6 & 7 Eliz. II, c. 62).....	454, 483, 495
s. 1 (1).....	483
s. 1 (4).....	493, 497
s. 2 (1).....	489
s. 2 (2).....	457
s. 2 (4).....	457, 459
s. 10.....	457
s. 503.....	495
s. 503 (1) (d).....	486
1959 County Courts Act (7 & 8 Eliz. II, c. 22).....	551
1968 Theft Act (c. 60), s. 1.....	185
1970 Merchant Shipping Acts (c. 36).....	93
s. 4.....	336, 345
s. 12.....	603
s. 16.....	334, 349
s. 16 (1).....	369
s. 18.....	334, 397
s. 76.....	510
s. 100.....	271
s. 167.....	510
s. 472.....	510
s. 554.....	510
s. 556.....	510
s. 561.....	510
1971 Merchant Shipping (Oil Pollution) Act (c. 59).....	374, 432, 567
s. 1.....	440
1979 Merchant Shipping Act (c. 39).....	441, 462, 479, 486
	491, 503, 504, 507
s. 17.....	447, 451, 468, 480, 499
s. 18.....	463, 466, 468, 480, 499
Schedule 4 Part 1.....	451
Article 2, para.	
(1) (a).....	488, 504, 584
(1) (b).....	488
(1) (c).....	488, 584
(1) (d).....	488
(1) (e).....	488

(1) (f).....	488
Schedule 4 Part I, Article 3.....	458
Schedule 4 Part I, Article 3.....	488
Schedule 4 Part I, Article 4.....	462, 469, 488, 505
Schedule 4 Part I, Article 6.....	503, 504, 507
Schedule 4 Part I, Article 8 and Part II, para. 7 (1).....	492
Schedule 4 Part II, para. 2.....	488
Schedule 4 Part II, Para. 4.....	440, 488
Schedule 4 Part II, para. 5 (2).....	483
Schedule 5 para. 6 (2).....	222, 441, 622, 625
Schedule 7 Part I.....	447, 454, 480, 492, 502
1981 Supreme Court Act (c. 54).....	559, 561, 567, 568, 597, 622
s. 20 (2) (a).....	553
s. 20 (2) (f).....	280, 293, 570
s. 20 (2) (g).....	241, 587
s. 20 (2) (b).....	555
s. 20 (2) (e).....	219, 580
s. 20 (2) (h).....	241, 584
s. 20 (2) (j).....	580
s. 20 (2) (k).....	587
s. 20 (2) (m).....	593
s. 20 (2) (p).....	597
s. 20 (2) (q).....	236
s. 20 (2) (n).....	594, 595
s. 20 (2) (s).....	619
s. 20 (7).....	559, 605
s. 21 (2).....	607
s. 21 (3).....	606
s. 21 (4).....	607, 610
s. 21 (4) (i).....	613
s. 22 (1).....	606
s. 24 (1).....	592, 625
1981 Supreme Court Act, Schedule 7.....	597, 604

## COMMONWEALTH

1901 Acts Interpretation Act (No. 2), s. 4.....	181
1901-73 Customs Act	
s. 148.....	619
s. 228.....	619
1902 Claims Against the Commonwealth Act (No. 21).....	164, 454
1903 Judiciary Act (No. 6).....	532
s. 23 (2) (b).....	375
s. 30A.....	533
s. 40.....	459
s. 56.....	164, 454
s. 57.....	164, 454
s. 58.....	454
s. 59.....	454
s. 60.....	454
s. 61.....	454
s. 62.....	454
s. 63.....	454
s. 64.....	454
s. 65.....	454

s. 66.....	454
s. 67.....	454
1903-1955 Judiciary Act (No. 35) ss. 56 and 64.....	455
1903-1973 Judiciary Act.....	196
1904 Sea-Carriage of Goods Act (No. 14).....	305
1909 Seamen's Compensation Act (No. 29).....	123
s. 13.....	281
1909-73 Marine Insurance Act	
s. 58.....	600
s. 59.....	600
s. 60.....	600
s. 72 (1).....	590
s. 72 (2).....	590
s. 91.....	600
1911 Lighthouses Act (No. 14).....	250, 595, 596
1911 Seamen's Compensation Act (No. 13).....	122, 281, 289
	284, 571, 578
s. 5AA (1) (a).....	285
s. 5B.....	286
s. 13 (1).....	571
1911-1947 Seamen's Compensation Act.....	286
1911-68 Seamen's Compensation Act (No. 124).....	287
1911-73 Seamen's Compensation Act.....	286, 291, 293, 326
s. 4 (1) (b).....	289
s. 4 (1) (c).....	282, 289
s. 5.....	286
s. 10A (3).....	287
1912 Navigation Act.....	66, 119, 313, 345, 350, 382
	450, 510, 554
s. 1.....	101
s. 127.....	286
s. 132.....	286, 345
s. 259.....	542
s. 259 (1).....	393
s. 260.....	542
s. 261.....	542
s. 262.....	542, 544
s. 263.....	101, 542
s. 264.....	542
s. 265.....	542
s. 328.....	583
s. 329.....	129
s. 396.....	542
Part VIII.....	456
1912-1920 Navigation Act (No. 1)	
Part IV, Division 10.....	119, 120, 467
s. 2 (2).....	125
1912-1925 Navigation Act (No. 8) Part IX.....	126
s. 329.....	129
1912-1935 Navigation Act (No. 30)	
s. 46.....	275
s. 329.....	129
1912-73 Navigation Act.....	57, 106, 184, 273, 286, 336, 386, 394
	431, 449, 464, 471, 498, 507, 540, 583
	584
s. 2A.....	449
s. 6 (1).....	487, 589
s. 10.....	351
s. 59.....	273, 312, 570
s. 65 (1).....	459

s. 71.....	603
s. 83 (1).....	349
s. 83 (1) (d).....	369
s. 83 (2).....	400, 408
s. 83 (3).....	369
s. 84.....	369
s. 88.....	369, 601
s. 94 (1).....	350, 408
s. 94 (2).....	397, 408, 599
s. 128 (2).....	560, 606
s. 157 (1).....	369
s. 163A (2) (d).....	560, 606
s. 187A.....	261
s. 259 (1).....	393
s. 263 (1).....	86
s. 265.....	86
s. 289 (2).....	560
s. 298 (2).....	606
s. 315.....	582
s. 315 (1).....	366
s. 315 (2).....	365
s. 317.....	377
s. 324 (1).....	415
s. 331.....	456
s. 332.....	456
s. 333.....	456, 460, 496, 499, 500, 502, 506, 628
s. 334.....	456
s. 334 (1).....	487
s. 335.....	456, 547
s. 335 (1).....	490
s. 335 (1) (b).....	548
s. 338.....	200, 463, 466
s. 385.....	549, 554
s. 396.....	572
s. 396 (1).....	354, 381, 413, 418
s. 405 (1).....	415
s. 405A.....	248, 282, 583
s. 405A (1) (b).....	390
s. 410B.....	577, 592
s. 410B (2).....	502
Part II Divisions 13 & 14.....	343, 593
IV Division 12.....	424
VII.....	583
VIII Division 1.....	292, 439, 440, 456, 460, 467 505, 547, 572
1914 Judiciary Act (No. 11).....	533, 534
s. 2.....	544
1924-73 Sea-Carriage of Goods Act.....	236, 306, 307, 422, 424, 430 464, 466, 467, 469, 505, 507, 508
s. 10 (1).....	431, 467
Art. IV r. 2 (b).....	508
r. 6.....	539
1942 Statute of Westminster Adoption Act (No. 56).....	105, 119, 122, 134, 185, 281 325, 450, 454, 457, 534, 621
s. 2 (4).....	459
1947-73 International Monetary Agreements Act, s. 3 (1).....	437, 489
1952-75 Fisheries Act (No. 3) s. 4.....	619

	s. 13D.....	619
1956	Australian Coastal Shipping Commission Act (No. 41).....	127
	s. 36 (1).....	127
1958	Navigation Act (No. 36).....	276
	s. 100.....	121
	s. 157.....	582
1960	Pollution of the Sea by Oil Act (No. 11).....	223, 245
1966-73	Bankruptcy Act, s. 109.....	292
1970-73	Commonwealth Places (Application of Laws) Act.....	133
1972	Pollution of the Sea by Oil (Shipping Levy) Act (No. 132)...	257
1972	Pollution of the Sea by Oil (Shipping Levy Collection) Act (No. 133).....	257
1973	Seas and Submerged Lands Act (No. 161).....	131, 133
	s. 10.....	131
1976	Commonwealth Historic Shipwrecks Act (No. 190).....	376
	s. 20 (3).....	378
1979	Navigation Amendment Act (No. 98).....	134, 431, 459, 461 462, 469, 480, 467 476, 477, 487, 507 572
	s. 65.....	572
	s. 65 (1).....	200, 449, 456, 463, 466, 494, 628 502, 507, 573, 584
	s. 104 (3).....	460
1979	National Companies and Securities Act (No. 173).....	197
1979	Crimes at Sea Act (No. 17).....	186
	s. 3 (1).....	187
1980	Coastal Waters (State Title) Act (No. 77).....	133, 376
	s. 5.....	417
1980	Historic Shipwrecks Amendment Act (No. 88).....	376
1980	Navigation Amendment Act (No. 87)	
	s. 3.....	487
	s. 4.....	449, 456
	s. 88.....	583
	s. 93.....	456, 460, 487, 488
	s. 98.....	549, 554
	s. 98 (1).....	539
1981	Navigation Act Amendment Act (No. 10), s. 8	
	s. 3 (1) (b).....	187
	s. 8.....	344
	s. 8 (1).....	344
1981	Protection of the Sea (Powers of Intervention) Act (No. 33).....	184, 245, 249, 262 373, 435, 436
	s. 8.....	439, 491
	s. 8 (2).....	372
	s. 8 (5).....	224
	s. 9.....	439, 491
	s. 10.....	439, 491
	s. 10 (3).....	372
1981	Shipping Registration Act (No. 8).....	135, 137, 181 183, 184, 193 195, 198, 199 226, 288, 292 343, 541, 545 557, 561

s. 3 (1).....	541
s. 4.....	541, 545
s. 9.....	226
s. 11 (1) (b).....	152, 301
s. 14.....	557
s. 14 (d).....	226
s. 24.....	160
s. 32.....	619
s. 33.....	619
s. 38.....	178, 197, 560
s. 39.....	176, 560
s. 40.....	559, 560
s. 41.....	559, 560
s. 42.....	560
s. 43.....	560
s. 44.....	560
s. 45.....	560
s. 46.....	560
s. 47.....	155, 178, 553, 560
s. 59.....	192, 546
s. 60.....	192
1981 Protection of the Sea (Civil Liability)	
Act (No. 31).....	184, 215, 225, 244
	432, 434, 491, 568
	600
s. 7 (2).....	434
s. 20.....	254
s. 20 (1).....	250
s. 20 (3).....	436
s. 22.....	374, 402
s. 22 (1).....	252, 568
s. 22 (3) (c).....	229
s. 22 (4).....	249
1981 Protection of the Sea (Shipping Levy	
Collection) (No. 35).....	184, 259
s. 3.....	596
s. 4.....	259
s. 8.....	259
s. 12 (1).....	259
1981 Protection of the Sea (Shipping Levy) (No. 34).....	596
1981 Protection of the Sea (Discharge of Oil	
from Ships) Act (No. 32)	
s. 3.....	245
s. 12 (2) (c).....	229
s. 14 (2) (c).....	229
1983 Navigation (Protection of the Sea)	
Amendment Act (No. 40), s. 6.....	242
1983 Protection of the Sea (Prevention of	
Pollution from Ships) Act (No. 41).....	438
1984 Shipping Registration Amendment Act (No. 16).....	546, 547
s. 4.....	184
s. 15.....	178, 198, 541, 560
s. 16.....	560
s. 17.....	560
s. 18.....	196
s. 29.....	558, 621
*1985 Draft Admiralty Bill.....	553, 616
clause 3 (1).....	592
clause 4 (2) (a) (ii).....	553
(iii).....	557



(iv).....	560, 607
(2) (c).....	561, 562
(2) (d).....	565, 566, 603
(3) (a).....	566, 567
(3) (b).....	567-569
(3) (c).....	570-572
(3) (d).....	572-577
(3) (da).....	578-580
(3) (e).....	580
(3) (f).....	584-587
(3) (g).....	587
(3) (h).....	589, 591
(3) (j).....	591, 592
(3) (k).....	592
(3) (m).....	593
(3) (n).....	594
(3) (o).....	595
(3) (p).....	596
(3) (q).....	596-597
(3) (r).....	599
(3) (s).....	601
(3) (t).....	603-604, 616
(3) (a) to (t).....	607
17 (1) and (2) .....	606
19 (a).....	607-610; 616
19 (b).....	610
20 (a) and (b).....	610-611
21 (b).....	611, 613, 616
22 (1), (2) and (3).....	615
23 (1) and (3).....	613
31 (1).....	222, 614
32 (1).....	618
37 (5) .....	259, 349, 402, 567, 596

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#### NEW SOUTH WALES

1832 (New South Wales Act) (2 Gul. IV No. 10).....	510
s. 14.....	511
s. 15.....	518
1847 Merchant Seamen Act (11 Vic. No. 23).....	51, 57
1849 Merchant Seamen Act (13 Vic. No. 28).....	51, 57, 58, 337, 511
s. 4.....	335
s. 19.....	517
s. 42 (2).....	58
s. 49.....	335
1852 Merchant Seamen (Foreign) Act (16 Vic. No. 25).....	57
1853 Water Police Act (17 Vic. No. 36), s. 10.....	57, 512
1864 Seamen's Laws Consolidation Act (27 Vic. No. 13).....	52, 512, 514, 518
s. 39.....	335
s. 40.....	58
s. 48.....	514
s. 49.....	335, 514
s. 50.....	58, 514
1871 Navigation Act (35 Vic. No. 7) s. 89.....	89

	s. 98.....	99, 100
	s. 120.....	99
1886	Employer's Liability Act (50 Vic. No. 8).....	271
1897	Compensation to Relatives Act (No. 31), s. 3.....	542, 571
1898	Bills of Sale Act (No. 10), s. 3.....	193
1898	Seamen Act (No. 46).....	52
1899	Navigation (Amendment) Act (No. 32).....	98
1901	Navigation Act (No. 60).....	69, 103, 110, 111, 124, 392
	s. 117.....	100, 101
1901-1935	Navigation Act.....	69
1901-1949	Navigation Act, s. 113.....	68
1902	Usury, Bills of Lading and Written Memorandum Act (No. 43), s. 5.....	294, 303
1908	Navigation (Amendment) Act (No. 34).....	111
1926	Workers' Compensation Act (No. 15).....	289
	s. 46 (2).....	287
	s. 46 (3) (f).....	292
	s. 49 (1).....	292
1926-1938	Workers' Compensation Act, s. 65.....	275
1941	Navigation Amendment Act (No. 27), s. 2.....	69
1954	Navigation (Amendment) Act (No. 8), s. 2.....	68
1960	Prevention of Oil Pollution of Navigable Waters Act (No. 48).....	223, 432
	s. 4 (1).....	227
	s. 7 (1) (a).....	230
	s. 7 (1) (b).....	231
	s. 7 (1) (b) (ii).....	232
	s. 7D (3).....	402
	s. 8.....	438
	s. 8 (1).....	237
	s. 8 (2).....	237
	s. 9.....	438
1961	Companies Act (No. 71).....	196
1965	Law Reform (Miscellaneous Provisions) Act (No. 32)	
	s. 10.....	572
	s. 10.....	394
1969	Limitation Act (No. 31)	
	s. 22 (1).....	412
	s. 22 (2).....	382, 413, 417
	s. 22 (3).....	354, 413
1970	Supreme Court Act (No. 52).....	417
1973	Prevention of Oil Pollution of Navigable Waters (Amendment) Act (No. 59).....	432
	s. 7A.....	371
	s. 7A (1).....	240
	s. 7A (3).....	240
	s. 7C.....	372
	s. 7C (1).....	202
	s. 7D (3) (b).....	372
	s. 7D (4) (a).....	243
	s. 7D (4) (b).....	243
	s. 7E.....	244
	s. 8A (1).....	244
1979	Commercial Vessels Act (No. 41).....	112
	s. 16.....	111
1979	Constitutional Powers (Coastal Waters) Act (No. 138).....	133, 376
	s. 5.....	417
1980	Crimes (Offences at Sea) Act (No. 145).....	186

## QUEENSLAND

1867	Common Law Practice Act (31 Vic. No. 17), s. 12.....	542
1867	Supreme Court Act (31 Vic. No. 23).....	417
	s. 20.....	391
1867	Mercantile Act (No. 36).....	442
1876	Navigation Act (41 Vic. No. 3).....	76, 111, 112
	s. 82.....	77
1876-1896	Navigation Acts.....	77
1882	Port Dues Revision Act (46 Vic. No. 12).....	57
	s. 13.....	76
1892	Factors Act (No. 56 Vic. No. 8)	
	s. 5.....	303
	s. 7.....	303
1896	Navigation Act Amendment Act (60 Vic. No. 31), ss. 6-15.....	77
1911	Navigation Acts Amendment Act (2 Geo. V No. 5), s. 4.....	77
1916-1965	Workers' Compensation Act.....	292
	s. 3 (1).....	289
	s. 9A.....	292
1916-1966	Workers' Compensation Act, s. 3 (1) (c).....	290
1930	Sea-Carriage of Goods (State) Act	
	(21 Geo. V No. 18), s. 3.....	113
1939	Navigation Acts Amendment Act (3 Geo. VI No. 26)....	57, 66, 112
	s. 48.....	344
	s. 77.....	125
1946-1959	State Transport Facilities Acts.....	108, 109
1955	Bills of Sale and Other Instruments Act	
	(4 Eliz. II No. 16), s. (1) (viii) (c).....	193
1958	Queensland Marine Act (7 Eliz. II No. 37).....	77, 112
	s. 4.....	125
	s. 71 (1).....	59
	s. 75.....	58
	s. 77 (2).....	344
	s. 143 (2).....	78
	s. 143 (3).....	78
	s. 174.....	595
	s. 219.....	595
	s. 243 (h).....	595
	s. 243 (j).....	595
	Part VIII.....	592
1958-1979	Queensland Marine Acts.....	60
1960	State Transport Act (9 Eliz. II No. 48).....	107, 108, 109
	s. 43.....	107
1960	Pollution of Waters by Oil Act (No. 29)	
	s. 3 (1).....	224
	s. 6.....	438
	s. 7.....	438
	s. 23 (3).....	402
1961-1980	Companies Act (No. 55).....	196, 197
	s. 100.....	198
1962	Transport Laws Validation Act (11 Eliz. II No. 24).....	108
1963	Queensland Marine Act Amendment Act (No. 1).....	112
1967	Queensland Marine Act Amendment Act (No. 1).....	112
1972	Queensland Marine Act Amendment Act (No. 1).....	112
1973	Pollution of Waters by Oil Act (No. 33).....	223, 433
	s. 9.....	228
	s. 10.....	230
	s. 12 (1) (a).....	230
	s. 12 (1) (b).....	231, 232
	s. 13 (1).....	237

	s. 13 (2).....	237
	s. 20.....	371
	s. 20 (1).....	240
	s. 20 (3).....	240, 371
	s. 22.....	372
	s. 23 (3) (b).....	372
	s. 24.....	371
	s. 25.....	244
	s. 29.....	244
1974	Limitation of Actions Act (No. 75).....	417
1975	Queensland Marine Act Amendment Act (No. 48).....	112
1979	Queensland Marine Act Amendment Act (No. 9).....	112
1980	Constitutional Powers (Coastal Waters) Act (No. 1).....	133, 376
	s. 5.....	417
1981	Companies (Application of Laws) Act (No. 110).....	197
	s. 30 (9).....	198
	s. 39 (9).....	198

## SOUTH AUSTRALIA

1836	(Marine Board Act) (No. 3).....	79
1847	(Marine Board Act) (No. 13).....	79
1860	Marine Board Act (No. 17).....	62, 79
1873	Marine Board Amendment Act (No. 6).....	61, 62
	s. 9.....	62
1879	Marine Board Amendment Act (No. 155).....	79
1881	Marine Board and Navigation Act (44 & 45 Vic., No. 237).....	62, 80, 81, 114, 335, 514
	s. 82.....	335
	s. 194.....	81
	s. 379.....	518
	Part V.....	592
1881-1974	Arbitration Act, s. 3.....	302
1886-1972	Bills of Sale Act, s. 2.....	194
1902	Marine Board and Navigation Act (No. 814), s. 24.....	63
1906	Marine and Navigation Act Further Amendment Act (No. 917).....	63, 343
	s. 6 (3).....	530
1935-1975	Limitation of Actions Act.....	417
1935-1975	Supreme Court Act, s. 111.....	394, 436
1936	Wrongs Act (No. 2267) s. 19.....	571
	s. 27a.....	573
1936-1937	Marine Act (No. 2337).....	63, 114
1936	Harbors Act (No. 2290).....	117, 448
	s. 124.....	502
1936-1974	Harbors Act, s. 124 (1).....	106
1936	Mercantile Act (No. 2285) s. 14.....	294, 303
	s. 15.....	303
1936-1975	Marine Act.....	63, 81
	s. 35.....	82
	s. 146.....	125
	s. 147.....	125
1961-1975	Prevention of Pollution of Waters by Oil Act.....	434
1961	Prevention of Pollution of Waters by Oil (No. 34).....	223
	s. 3.....	227
	s. 6 (1) (a).....	230

s. 6 (1) (b).....	232
s. 7 (1).....	237
s. 7 (2).....	237
s. 7 (3).....	237
s. 8.....	438
s. 9.....	438
1961-1979 Pollution of Waters by Oil Act, s. 5.....	227
1962 Companies Act (No. 56).....	196
1968 Marine Act Amendment Act (No. 62), s. 4.....	116
1971-79 Workmen's Compensation Act	
s. 17 (1).....	292
s. 83 (1).....	287
1972 Prevention of Pollution of Waters by Oil Act	
Amendment Act (No. 87), s. 3.....	202
1976 Marine Act Amendment Act (No. 55).....	114
s. 8.....	82
1979 Prevention of Pollution of Waters	
by Oil Act Amendment Act (No. 24).....	434
s. 7.....	372
s. 7a.....	371, 372
s. 7A (1) (d).....	240
s. 7A (1) (k).....	240
s. 7d (1) (a).....	243
s. 7d (1) (b).....	243
s. 7 (e) (1).....	372, 402
s. 7 (e) (2).....	372, 402
1979 Constitutional Powers (Coastal	
Waters) Act (No. 68).....	133, 376
s. 5.....	417
1980 Crimes (Offences at Sea) Act (No. 5).....	186
1981 Historic Shipwrecks Act (No. 76).....	376

## TASMANIA

1857 Bills of Lading Act (20 Vic. No. 25)	
s. 1.....	303
s. 3.....	294
1859 Merchant Seamen Act (23 Vic. No. 7).....	54, 337
s. 43.....	335, 339
s. 49.....	513, 514
s. 50.....	335, 513, 514
s. 51.....	513
s. 52.....	513
s. 53.....	513, 514
1870 Foreign Seamen Amendment Act (34 Vic. No. 22), s. 1.....	53
1889 Marine Act (53 Vic. No. 34).....	70
1900 Bills of Sale Act (64 Vic. No. 70), s. 4 (1).....	194, 561
1908 Limited Partnerships Act (No. 6).....	442
1921 Marine Act (12 Geo. V No. 60).....	115
1925 Cruelty to Animals Prevention Act (16 Geo. V No. 30).....	186
1927 Workers' Compensation Act (18 Geo. V No. 82), s. 4 (2).....	288
1932 Supreme Court Civil Procedure Act (23 Geo. V No. 58)	
s. 34.....	565
s. 64 (2).....	417
s. 64 (3).....	417
s. 64 (4).....	417
1934 Fatal Accidents Act (25 Geo. V No. 30), s. 4.....	571
1935 Merchant Seamen Act (26 Geo. V No. 93).....	54
s. 3 (1).....	338
1954 Tortfeasors and Contributory Negligence	
Act (No. 14), s. 4.....	573

1961	Oil Pollution Act (No. 15).....	223
	s. 2.....	226
	s. 3.....	230
	s. 4 (1).....	232
1962	Companies Act (No. 66).....	196, 197
	s. 100 (1).....	196
1963	Marine Act (No. 97).....	115
1973	Environmental Protection Act (No. 34), s. 16.....	229
1974	Limitation Act (No. 98)	
	s. 8 (1).....	412
	s. 8 (2).....	382, 413, 417
	s. 8 (3).....	354, 413
1976	Marine Act (No. 18).....	71, 115, 117
	s. 4 (1).....	226
	s. 122.....	71
	s. 135 (2).....	72
	s. 136 (2).....	72
	Part XII.....	592
1976	Offshore Waters Jurisdiction Act (No. 34).....	186
1977	Marine Act (No. 125).....	116
	s. 8.....	73
1979	Constitutional Powers (Coastal Waters) (No. 62).....	133, 376
1979	Crimes (Offences at Sea) Act (No. 69).....	186
1980	Marine Amendment Act (No. 36).....	116
1981	Marine Amendment Act (No. 8).....	116

## VICTORIA

1853	(Seamen's Act) (16 Vic. No. 33).....	55
1865	Passengers Harbour and Navigation Act (28 Vic. No. 255).....	73, 95
	s. 77.....	96
1865	Seamen Statute (28 Vic. No. 245).....	55
	s. 17.....	56
	s. 18.....	56
1890	Seamen's Act (54 Vic. No. 1139).....	56
1890	Marine Act (54 Vic. No. 1165).....	56, 74
	s. 103.....	270
	s. 183.....	111
	s. 230.....	338
1915	Marine Act (6 Geo. V No. 2688)	
	Part VI.....	75
	s. 234.....	344
1928	Marine Act (No. 3728).....	57
	s. 13.....	129
	s. 72.....	300
1954	Foreign Seaman's Act (18 Vic. No. 6).....	55
1958	Seamen's Act (No. 6362).....	57
1958	Marine Act (No. 6302).....	57, 75, 113
	s. 5.....	302
	s. 59 (3) (f).....	292
	s. 75.....	303
	s. 97.....	75
	s. 132.....	111
	s. 234.....	344
	s. 243.....	595
	s. 263.....	125
	Part V Div. 3.....	592

1958	Supreme Court Act (No. 6387)	
	s. 64.....	394, 436
	s. 66 (1).....	393
1958	Wrongs Act (No. 6420), Part III, s. 16.....	571
1958	Workers' Compensation Act (No. 6419).....	291
	s. 59 (2).....	287
1958	Limitation of Actions Act (No. 6295).....	417
1961	Companies Act (No. 6839).....	196

## WESTERN AUSTRALIA

1855	Bills of Lading Act (Imp.) (18 & 19 Vic., c. 111)	
	s. 3 as adopted by 1856 Act (20 Vic. No. 7).....	294
1871	(Seamen's Relief Act (34 Vic. No. 2).....	64
1873	Harbours and Pilotage Act (37 Vic. No. 14), s. 6.....	515
1895-1970	Arbitration Act, s. 6.....	302
1898	Crown Suits Act, (62 Vic. No. 9).....	83
1899	Bills of Sale Act (No. 45), s. 5.....	194
1903	Merchant Shipping Act Application Act	
	(3 Edw. VII No. 7).....	64, 343, 515
	s. 2 (1).....	338
1904	Navigation Act (No. 59).....	82, 114
1909	Sea-Carriage of Goods Act (9 Edw. VII No. 26).....	115
1909	Limited Partnership Act (No. 17).....	442
1912-1935	Pearling Act.....	149
1926	Navigation Act Amendment Act (No. 33), s. 10.....	82
1935-1979	Supreme Court Act	
	s. 26.....	436
	s. 26 (1).....	394
	s. 29.....	413, 417
1947	Law Reform (Contributory Negligence and	
	Tortfeasors' Contribution) Act (No. 23), s. 4.....	573
1948	Western Australian Marine Act	
	(No. 72).....	84, 115, 344
	s. 4.....	125
	Part VII.....	65, 66
1948-1973	Western Australian Marine Act.....	185
1959	Fatal Accidents Act (No. 20), s. 4.....	544, 571
1960	Prevention of Pollution of Waters by Oil Act	
	(No. 33), as amended.....	223
	s. 3 (1).....	227
	s. 6 (1) (a).....	230
	s. 6 (1) (b).....	232
	s. 7 (1).....	237
	s. 7 (2).....	237
	s. 7 (3).....	237
	s. 8.....	438
	s. 9.....	438
1961	Companies Act (No. 82).....	196
1964	Museum Act Amendment Act (No. 58), s. 11.....	375
1965	Western Australian Marine Act Amendment Act	
	(No. 25).....	84
1966	Western Australian Marine Act Amendment Act (No. 69)	
	s. 4.....	84
	s. 4 (b).....	65
1967	Shipping and Pilotage Act (No. 17).....	82, 592
1971	Environmental Protection Act (No. 63), s. 80.....	229
1973	Western Australian Marine Act Amendment Act	
	(No. 2) (No. 109)	
	s. 6.....	85, 86

1973	Prevention of Pollution of Waters by Oil Act Amendment Act (No. 82) s. 4.....	202
1973	Maritime Archaeology Act (No. 66).....	375
1977	Western Australian Marine Act Amendment Act (No. 67), s. 13.....	84
1977	Offshore (Application of Laws) Act (No. 72).....	186
1979	Constitutional Powers (Coastal Waters) Act (No. 95).....	133
	s. 5.....	417
1979	Crimes (Offences at Sea) Act (No. 96).....	186
1981	Act (No. 86) s. 16 (2) (d). ....	292
	s. 173. ....	292
	s. 179.....	571

## MALAYSIA

1952	Merchant Shipping Ordinance (No. 70) ss. 41-47.....	178
1964	Courts of Judicature Act (No. 7) s. 26.....	552

## SINGAPORE

1970	High Court (Admiralty Jurisdiction) Act, Cap. 6, Singapore Statutes, Rev. Ed., s. 4 (4).....	617
1970	Merchant Shipping Act, Cap. 172, Singapore Statutes, Rev. Ed., ss. 416, 416A-416F.....	178



TABLE OF CONTENTS

	<i>Page</i>
<i>Declaration</i> . . . . .	(i)
<i>Acknowledgements</i> . . . . .	(ii)
<i>Thesis Abstract</i> . . . . .	(iv)
<i>Table of Cases</i> . . . . .	(vi)
<i>Table of Statutes</i> . . . . .	(xxii)
<i>General Introduction</i> . . . . .	(xvii)

## CHAPTERS

<b>ONE</b>	<b>RECEPTION OF ENGLISH MARITIME LAW</b> . . . . .	1
	I. INTRODUCTION . . . . .	1
	II. ANALYSIS OF EARLY AUTHORITIES . . . . .	2
	1. Sale of Ships in early Law . . . . .	3
	2. Rights of Part-owners . . . . .	6
	3. Masters as Agents . . . . .	8
	4. Personal Liability of Master . . . . .	11
	5. Salvage . . . . .	13
	6. Collision at Sea . . . . .	16
	7. Wages of Seamen . . . . .	18
	8. Claims of Material Men and Others. . . . .	24
	III. UNENACTED LAW . . . . .	27
	IV. STATUTE LAW PRIOR TO 1828 . . . . .	37
	V. STATUTE LAW AFTER 1828 . . . . .	43
	VI. CONCLUSION . . . . .	48
<b>TWO</b>	<b>EVOLVEMENT OF MARITIME LAW IN THE COLONIES AND STATES</b> . . . . .	49
	I. INTRODUCTION . . . . .	49
	II. SEAMEN . . . . .	50
	1. New South Wales . . . . .	50
	2. Tasmania . . . . .	53
	3. Victoria . . . . .	55
	4. Queensland . . . . .	57
	5. South Australia . . . . .	60
	6. Western Australia . . . . .	64
	III. NAVIGATION . . . . .	66
	1. New South Wales . . . . .	66
	2. Tasmania . . . . .	70
	3. Victoria . . . . .	73
	4. Queensland . . . . .	76
	5. South Australia . . . . .	79
	6. Western Australia . . . . .	82
	IV. CONCLUSION . . . . .	85

<b>THREE</b>	<b>VALIDITY OF COLONIAL, STATE AND COMMONWEALTH LEGISLATION</b>	88
I.	INTRODUCTION	88
II.	EFFECTS OF COLONIAL ENACTMENTS	89
	1. Pre-1900 Colonial Legislation	89
	2. Imperial Policy	93
	3. Procedure	97
	4. Collision Regulations	98
III.	COASTING TRADE	104
	1. Meaning	104
	2. Conformity to Conditions	107
	3. An Analysis of the Status of State Legislation	110
	4. Some Observations on the Scope of Sections 735 and 736	116
IV.	CONFLICT BETWEEN STATE AND COMMONWEALTH LAWS	118
	1. Commonwealth Laws prior to Adoption of Statute of West- minster 1931 (Imp.)	118
	2. Sections 51 (i) and 98 of Commonwealth Constitution	122
	3. Section 51 (xxix)	131
V.	CONCLUSION	134
<b>FOUR</b>	<b>POLICY OF SHIP REGISTRATION ACTS</b>	137
I.	INTRODUCTION	137
II.	EARLY DEVELOPMENTS	137
	1. Beginnings of Ship Registration	137
	2. Advantages of the System	140
III.	IDENTIFICATION OF SHIPOWNERS	144
IV.	EFFECTS ON PROPERTY	149
V.	PASSING OF PROPERTY	155
VI.	MISCELLANEOUS EXCEPTIONS	161
	1. Registration short of Ownership	161
	2. Other Modes of acquiring Title or Rights	164
VII.	MORTGAGE	167
	1. Early Law	167
	2. Modern Aspects of Ship Security	171
VIII.	REGISTRATION OF SHIPS IN AUSTRALIA	179
	1. Application of Imperial Laws	179
	2. New Regime	181
	3. Relationship between Ship and the Flag State	183
	4. Centralised Register	187
	5. Mortgage of Ship or any Share therein	194
IX.	CONCLUSION	199

<b>FIVE</b>	<b>PROBLEMS OF MARINE POLLUTION BY OIL</b>	201
I.	INTRODUCTION	201
II.	COMMON LAW REMEDIES	203
	1. Nuisance	203
	2. Negligence	210
	3. Strict Liability	217
	4. Reforms	218
III.	STATE CONTROL OF OIL POLLUTION	223
	1. Explanatory Note	223
	2. Persons liable	225
	3. Defences	229
	4. Position under Maritime Law	235
	5. New Civil Liability	236
	6. Compensation for Third Parties	244
IV.	COMMONWEALTH LEGISLATION AND INTERNATIONAL CONVENTIONS	245
	1. Protection of the Sea (Powers of Intervention) Act 1981 (Comth.)	245
	2. Protection of the Sea (Civil Liability) Act 1981 (Comth.)	253
	3. Levy on Ships	257
V.	ESTABLISHMENT OF INTERNATIONAL FUND	259
VI.	CONCLUSION	261
<b>SIX</b>	<b>CLAIMS AGAINST SHIPOWNERS</b>	263
I.	THE PERSPECTIVE	263
II.	INJURIES TO SEAMEN	263
	1. The Old Law	263
	2. Interaction of Common Law	266
	3. Statutory Intervention	269
	4. Abolition of Doctrine of Common Employment	274
	5. Redress for Personal Injuries under Admiralty Law	276
	6. Statutory Compensation	280
	7. Commonwealth Legislation and Common Law	286
	8. State Compensation Acts	287
	9. An Evaluation	291
III.	CARGO LOSS OR DAMAGE	294
	1. Shipping Practice and Cargo Transportation	294
	2. Goods carried into Australia	296
	3. International Conventions - The Rules	305
IV.	NECESSARIES AND SERVICES TO SHIPS	312
	1. Necessitous Circumstances	312
	2. Dilemmas of Creditors	314
V.	CONCLUSION	326

<b>SEVEN</b>	<b>MARITIME LIENS</b>	329
I.	INTRODUCTION	329
II.	WAGE AND DISBURSEMENT LIENS	330
	1. Origin of Wage Lien	330
	2. Laws in Australian Colonies and States	334
	3. Commonwealth Legislation	344
III.	SALVAGE LIEN	352
	1. Origin	352
	2. Basic Requirements	354
	3. Statutory Intervention	368
IV.	DAMAGE LIEN	378
	1. Origin	378
	2. Position in Australia	380
	3. Circumstances giving rise to Damage Lien	382
V.	BOTTOMRY BONDS	395
VI.	ORDER OF PRIORITY	398
	1. Domestic Law	398
	2. Conflict of Laws	402
	3. At International Level	408
VII.	EXTINCTION OF MARITIME LIENS	410
VIII.	CONCLUSION	416
<b>EIGHT</b>	<b>LIMITATION OF LIABILITY</b>	421
I.	INTRODUCTION	421
II.	CONTRACTS OF CARRIAGE	422
	1. Bill of Lading Contracts	422
	2. Increase of Compensation	426
III.	POLLUTION OF WATERS BY OIL	432
	1. State Enactments	432
	2. Commonwealth Legislation	434
	3. Non-delegable Obligations	437
IV.	IMPERIAL LEGISLATION TILL 1900	441
V.	DEVELOPMENTS AFTER 1900	450
	1. Imperial Legislation	450
	2. Commonwealth Legislation	454
VI.	RESPONSIBILITY OF SHIPOWNERS	462
	1. Relationship between Actual Fault or Privity and Unseaworthiness	462
	2. Personal Blameworthiness of Ship- owner	469
	3. The Management Concept	474
	4. Extent of Vicarious Liability	480
	5. Monetary Aspects	488
	6. Contracting Out	498
VII.	NEW MARITIME CONVENTION	503

VIII.	CONCLUSION	505
NINE	ADMIRALTY JURISDICTION	509
I.	PREVIEW	509
II.	LEGISLATION OF AUSTRALIAN COLONIES	510
III.	VICE-ADMIRALTY COURTS	516
	1. Early Conferment of Jurisdiction <u>in Rem</u>	516
	2. Extension of Jurisdiction	521
IV.	COLONIAL COURTS OF ADMIRALTY ACT 1890	531
V.	COLONIAL COURTS OF ADMIRALTY	537
	1. Heads of Jurisdiction	537
	2. Removal of Master	538
	3. Dangerous Goods	539
	4. Beneficial Interest	540
	5. Loss of Life	541
	6. Other Aspects	544
VI.	REFORMS	549
	1. Development in English Admiralty Law	549
	2. Proposed Heads of Jurisdiction in Admiralty Act	552
	3. Proprietary Maritime Claims	553
	4. General Maritime Claims	566
	5. Scope of Claims and Mode of Exercise of Admiralty Jurisdiction	605
	6. Proceedings <u>in Rem</u>	606
VII.	CONCLUSION	618
	GENERAL CONCLUSIONS	621
I.	RECEPTION AND DEVELOPMENT OF MARITIME LAW IN AUSTRALIA	621
II.	NEED FOR REFORMS	623
III.	THE FUTURE	627
	<i>Select Bibliography</i>	630
	<i>Appendix</i>	

## General Introduction

### 1. Definition and Background

For the purpose of this research work, the expression "Australian maritime law" is to be understood mainly in the traditional sense. Unless otherwise stated in the context, the expression<sup>1</sup> is defined to include the following aspects of the law - namely:

- (1) Australian policy on ship registration and mortgages of Australian ships or shares therein as security, including the statutory protection accorded to registered mortgages;<sup>2</sup>
- (2) The rights and remedies of seamen, masters, necessities men, ship-repairers, salvors, cargo-owners, and other claimants in contract or tort;<sup>3</sup>
- (3) Maritime liens and their order of ranking;<sup>4</sup>
- (4) Matters relating to collision damage, contributory negligence, limitation of liability of shipowners and others,<sup>5</sup> including the defences available; and
- (5) The enforcement of claims by proceedings in rem and admiralty jurisdiction exercisable by courts in rem.<sup>6</sup>

The above areas constitute the "core" matters. The thrust of the investigation is directed towards an analytic and evaluative study of the growth and extension of, and changes in, this body of principles.

Britain's initial policy to expand overseas and her plan to establish a British merchant fleet to link Her Majesty's Dominions formed the groundwork of the Empire-building. These basic goals set in motion the process of growth and advancement in Australian maritime law. Behind the British merchant fleet concept was the philosophy of creating a body of law to regulate virtually all maritime matters, including claims. It is against this background of Imperial thrusts in the political, legislative, judicial and economic spheres that the development of Australian maritime law must be examined.

1. For meaning of "maritime law", see Earl Jowitt and C. Walsh, Jowitt's Dictionary of English Law (2nd ed. 1977), vol. II, p. 1147. As to meaning of "admiralty causes", see J.S. James, Stroud's Judicial Dictionary (4th ed. 1971), vol. I, p. 69.

2. See Chapter Four.

3. See Chapter Six.

4. See Chapter Seven.

5. See Chapter Eight.

6. See Chapter Nine.

The task is to ascertain, mainly from the legislative and case materials, the effects of the various factors at work during the time span of about twenty decades.<sup>7</sup>

The Imperial programme alone and its implementation are insufficient explanation for the existence of Australian maritime law in its present state. Attempts are made to evaluate the extent to which events in Australian legal and constitutional history coordinated to determine the character and content of the law. Australian input, in terms of judicial and legislative contributions, has been a significant on-going process at State and Commonwealth levels. The emergence of the Commonwealth of Australia, as an independent sovereign nation,<sup>8</sup> has resulted in the implementation of new maritime policies, and expedited the development of Australian maritime law.

## 2. Imperial Initiatives

A substantial part of Imperial law has been woven into the fabric of Australian maritime law. The operations of unenacted principles of English maritime law and Imperial legislation were the key factors. It is questionable as to how far early Imperial policy had mapped out the nature, content and growth pattern of Australian maritime law. The answer is found by a close analysis of the "Imperial legislation package". The epoch-making Acts are the Australian Courts Act 1828 (Imp.),<sup>9</sup> the Supreme Court (Admiralty) Act 1832 (Imp.),<sup>10</sup> the Colonial Laws Validity Act 1865 (Imp.),<sup>11</sup> the Vice-Admiralty Courts Act 1863 (Imp.),<sup>12</sup> the 1867 Act (Imp.),<sup>13</sup> the series of Merchant Shipping

7. The period covered ranges from 26th January, 1788, the date of Australia's first settlement, to 30th June, 1986, i.e. before the proposed Admiralty Act (Comth.) became law.

8. I.e. when the Statute of Westminster Adoption Act 1942 (Comth.) came into force on 9th October, 1942; see China Ocean Shipping Co. and Others v. State of South Australia (1979) 27 A.L.R. 1, p. 8, per Barwick, C.J.; cf. Kirmani v. Captain Cook Cruises (1985) 59 A.L.J. 265, p. 276, per Murphy, J.

9. 9 Geo. IV, c. 83.

10. 2 William IV, c. 51.

11. 28 & 29 Vic., c. 63.

12. 26 & 27 Vic., c. 24.

13. Vice-Admiralty Courts Act Amendment Act (30 & 31 Vic., c. 45).

Acts (Imp.),<sup>14</sup> and the Colonial Courts of Admiralty Act 1890 (Imp.).<sup>15</sup> It is interesting to identify the functions which such Acts were intended to serve. The Australian Courts Act 1828 (Imp.) and the Merchant Shipping Acts (Imp.), passed in succession for more than two decades, stand out in legal history as the major "law transfer" mechanisms. To expedite the process, the Colonial Laws Validity Act 1865 (Imp.) and the Imperial merchant shipping legislation conferred on Colonial Parliaments new legislative powers. The third part of the Imperial plan was to establish tribunals in the Australian colonies, and to invest them with admiralty jurisdiction to administer Imperial maritime law. Just how far were the preconceived goals achieved under the Australian Courts Act 1828 (Imp.), the Supreme Court (Admiralty) Act 1832 (Imp.), the Vice-Admiralty Courts Act 1863 (Imp.), the 1867 Act (Imp.), and the Colonial Courts of Admiralty Act 1890 (Imp.)? The result will be known only after the investigation.<sup>16</sup>

### 3. Australian Contribution

The early laws enacted by the Legislative Councils for the "peace, welfare and good government"<sup>17</sup> of the colonies extended to shipping in the ports and harbours. They are examined for elements of maritime law. In time colonial maritime trade and activities expanded. This fact called for extended legislative powers to be conferred on the colonial legislatures. Colonial laws, with limited extraterritorial operation, were required for regulating shipping and for protecting passengers and the rights of seamen. Moreover, within the Imperial merchant shipping codes, which applied to the colonies, flexibility was needed to accommodate the local conditions and circumstances prevailing in the Australian maritime environment. The study enquires into the ingenious methods employed by the Imperial Parliament to cater for such needs, and also to ensure that the colonial, and later State, enactments passed were, or are, in line with Imperial policy.<sup>18</sup> An examination of the Imperial methods used

14. Including the 1854 Act (17 & 18 Vic., c. 104), the 1869 Act (32 & 33 Vic., c. 11), the 1894 Act (57 & 58 Vic., c. 60), the 1898 Act (61 & 62 Vic., c. 14), the 1900 Act (63 & 64 Vic., c. 32), and the 1906 Act (6 Edw. VII, c. 48).

15. 53 & 54 Vic., c. 27.

16. Covered mainly in Chapter Nine.

17. As to the powers given for such purposes, see R.D. Lumb, The Constitutions of the Australian States (4th ed. 1976), pp. 10, 14, 30, 34, 35 and 38.

18. See Merchant Shipping Act 1854 (Imp.), s. 547; Merchant Shipping Act 1894 (Imp.), ss. 264, 735 and 736.



necessarily entails an evaluation of the validity of the colonial and State enactments and their effects as law "reception" mechanisms.

A substantial contribution came from the vital role played by judges of the colonial Supreme Courts, the Vice-Admiralty Courts and the Colonial Courts of Admiralty. The manner in which maritime law was, or has been, administered and the adherence to Imperial policy, as an on-going "law reception" mechanism, are highly relevant factors. Imperial legislation providing for appeals against decisions given in maritime law to be taken to the Privy Council was a powerful check against Australian adventurisms.<sup>19</sup>

A landmark in legal history is the passing of the Navigation Act 1912-73 (Comth.). It is understandable that, in the early years of the Commonwealth, most sections of this Act were merely a re-enactment of the Imperial provisions. One outstanding constitutional event paved the way for significant development in Australian maritime law. The Statute of Westminster Adoption Act 1942 (Comth.) removed the limitations imposed by Imperial legislation on the powers of the Commonwealth Parliament. This new competence and the fact that Australia is a Federation of States gave rise to problems of inconsistency between Commonwealth and State legislation. It is part of our investigation to examine the areas of conflict, and what dynamic legislative measures have been taken to upgrade this branch of the law. One solution has stemmed from the 1980 Constitutional Agreement which has been formalised by Commonwealth and State legislation.<sup>20</sup> Each State Parliament is now empowered to pass laws to operate beyond the low-water mark adjacent to the high seas.

#### 4. Comparative Aspects

Development can only be gauged in relative terms. For our purpose, the United Kingdom's maritime law in the present state is

19. Vice-Admiralty Courts Act 1863 (Imp.), s. 22; Colonial Courts of Admiralty Act 1890 (Imp.), s. 6.
20. Coastal Waters (State Powers) Act (Comth.) (No. 75 of 1980); Constitutional Powers (Coastal Waters) Act (N.S.W.) (No. 138 of 1979); Constitutional Powers (Coastal Waters) Act (Qld.) (No. 1 of 1980); Constitutional Powers (Coastal Waters) Act (S.A.) (No. 68 of 1979); Constitutional Powers (Coastal Waters) Act (Tas.) (No. 62 of 1979); Constitutional Powers (Coastal Waters) Act (Vic.) (No. 9366 of 1980); Constitutional Powers (Coastal Waters) Act (W.A.) (No. 95 of 1979).

largely taken as the norm. The areas of Australian law, as defined above, are examined alongside their counterparts in the United Kingdom's law. This approach makes it possible to evaluate the extent and pace of development achieved, as well as the gaps, in Australian maritime law. There is a second facet of comparison. To ascertain how progressive or efficacious Australian maritime law is, it is necessary to compare the relative advantages or disadvantages of instituting personal actions at common law with those of bringing proceedings in rem. A third facet involves an examination of the no-fault liability for oil-pollution damage and the claims arising out of oil spills. Because maritime property, shipowners, and, in many cases, masters are directly affected, a study of the relevant legislation in relation to maritime law principles will throw light on the future development.<sup>21</sup>

The investigation will also highlight Australia's departures from the United Kingdom's law. They include the requirements for registration of Australian ships, the order of ranking of the wage lien and master's disbursement lien, the limitation of liability of shipowners and others, and differences in admiralty jurisdiction. Attempts are made to analyse the effects of the principles relating to such matters on the rights of persons under Australian law. It is, of course, questionable as to how far the policy underlying the Australian approach in each of those areas is sound or in her best national interests.

21. Discussed in Chapter Five and elsewhere.

## CHAPTER ONE

### RECEPTION OF ENGLISH MARITIME LAW

#### I. INTRODUCTION

This chapter traces the development of maritime law based on early authorities. The nature of this body of rules and the English courts which administered them will be identified. This approach is essential to a proper understanding of the process by which maritime law was imported into the Australian colonies.

Unlike the more commercially advanced states of the early ages, England had no maritime codes of her own. The wide popularity of England's seaports and fairs, as centres of maritime trade, attracted numerous European merchants and cargo ships to her harbours. This necessitated the recognition and application of foreign customs and sea laws in the settlement of commercial disputes involving foreign merchants.<sup>1</sup> It was clearly in England's interests to encourage the steady flow into the country of this enormous source of wealth. Moreover, to gain recognition as one of the maritime states, England, more by necessity than choice, adopted the laws of Oleron. According to Sir William Blackstone,<sup>2</sup> such laws "are received by all the nations of Europe as the ground and substruction of all their marine constitutions."<sup>3</sup>

At a later stage, these laws were incorporated in the Black Book of the Admiralty.<sup>4</sup> The Select Pleas in the Court of Admiralty<sup>5</sup>

1. Sir William Holdsworth, A History of English Law (3rd ed. 1945) vol. V, p. 129.
2. Commentaries on the Laws of England, vol. 1 (Coleridge's ed.) p. 419, referred to in footnote of Augusta v. Eugenie (1822) 1 Hag. Adm., p. 17.
3. Radcliffe and Cross, The English Legal System (15th ed. 1971), p. 243: "The origin of our maritime law is to be found in the sea-laws promulgated by Eleanor of Aquitaine at the castle on the isle of Oleron in the Bay of Biscay, in the late twelfth century."
4. Monumenta juridica, with appendix edited by Sir Travers Twiss (1871-1876), vols. II-IV.
5. Edited by R.G. Marsden (1894, 1897), 2 vols.

contained the records of the Court of Admiralty. They showed numerous cases which had been decided based on the usages of foreign merchants and mariners and the laws of Oleron. According to Welwood,<sup>6</sup>

"The debates of seafarers, and seafaring actions should be decided according to received laws and statutes of the sea...and if neither written nor unwritten custom nor consuetude occurs...the last refuge is the opinions and sentences of skilled and upright men in the profession and exercise of seafaring..."

The general sea laws and maritime usages imported into England in those early days provided judges with the "core material" of this discipline. By analogy and through judicial creativity, new principles were developed. Towards the end of the seventeenth century, the distinctive outline of English maritime law was beginning to assume its modern aspect. This trend signalled departures in a number of ways from the maritime laws of its European counterparts.

## II. ANALYSIS OF EARLY JUDICIAL AUTHORITIES

A study is made of the law prior to 26th January, 1788, and its progress through to 25th July, 1828, and beyond. Early in its history, the development of this branch of the law was greatly expedited by court decisions. It is vital to note that, as regards the contributions made, little difference existed between judges exercising jurisdictions in common law, equity and admiralty. The body of law was made up of rules laid down by a large section of the judiciary. This fact accounted for its rapid growth and its potential to cope effectively with the elements of international character. An insight into legal history is found in the "Ruckers"<sup>7</sup> in the following words:

"The jurisdiction of the Court of Admiralty was exercised by the Kings of England in their household, with the assistance of the Judges of the Common Law, till the reign of Edw. 3."

In the late nineteenth century, Lord Esher, M.R., in The Chartered Merchants Bank of India, London and China v. The Netherlands India Steam Navigation<sup>8</sup> referred to "maritime law" as "part of the common law of England." However, maritime law as administered later by the

6. William Welwood, An Abridgement of all Sea Laws (1613 ed.), Title V.

7. (1801) 4 C. Rob. 73, 74, footnote (b).

8. (1883) 10 Q.B.D. 521, p. 537; 5 Asp. M.C. 65, p. 68, per Lord Esher, M.R.

High Court of Admiralty was different from common law and equity in their traditional sense. The differences, attributed to the nature and exercise of the admiralty jurisdiction, laid in matters of procedure and substantive law.<sup>9</sup> In time, the law as administered in the High Court of Admiralty, assumed a distinctive maritime character. Consequently, in tracing the development and the importation into Australia of this branch of the law, care must be taken to identify its two-fold character. A clear distinction must be drawn between the High Court of Admiralty decisions and those of the other courts, e.g. the Court of Common Pleas, the Court of King's Bench, the Court of Chancery, etc. Although these courts were involved in developing the law, the distinction is of fundamental importance. It helps to explain that, for the purpose of the reception, this branch of the law was treated as comprising two segments.<sup>10</sup>

#### 1. Sale of Ships in early Law

England had to rely on the sea laws and maritime codes of Europe. The principle relating to the sale of ships was stated by Malynes as follows:<sup>11</sup>

"The selling of a ship is not a sufficient cause to alienate the same; but the quiet possession thereof must be delivered upon the sale made."

The delivery of quiet possession, as an essential condition, was not always possible. This meant that a ship while at sea could not be effectively sold. Probably to expedite commerce, the ancient practice was supplanted by a more acceptable method. This took the form of a bill of sale as the instrument of transfer which came into common use. One of the earliest English cases, which gave effect to its use, was decided in June 1790 by Lord Thurlow. In Ex parte Stodgroom,<sup>12</sup> it was held that the vendee was entitled under a bill of sale to a share of the property in a ship.

9. A number of basic distinctions between the three branches of law were highlighted in the Privy Council decision in The Neptune (1835) III Knapp 95, 100, 104, 117. The procedure differed according to whether the claim against the ship was brought in the Court of King's Bench or the Court of Admiralty: The Flora (1929) 2 Hag. Adm. 298.
10. As will be shown, each segment was imported into the colonies at a different phase of development.
11. Gerald Malynes, Lex Mercatoria (4th ed. 1688), p. 123.
12. (1790) 2 Cox. 234; Ves. Jr. (1755-1792), vol. 1, 162.

It not only undermined the ancient principle but judicially recognised a bill of sale as a means of passing property. No delivery of possession was considered necessary.

The scope of the decision was extended by M'Donald, C.B. to apply to a ship, of which the owners had no physical possession. He held that "the sale of a part of the property of a ship to be similar to that of a ship at sea, as actual delivery cannot take place."<sup>13</sup>

Judicial authorities had consistently enhanced the use of the bill of sale as proof of title to a chattel. This recognition enabled the document to serve a new commercial function. It was often used by shipowners for assigning their interests in the ship as mortgage security for the repayment of debts.<sup>14</sup> Its admissibility as evidence of a transaction was placed beyond doubt by the Court of Chancery. In Ex part Halkett,<sup>15</sup> the issue raised was whether or not the ship's master had the authority to pledge the ship for necessities supplied. Lord Chancellor Loughborough said:<sup>16</sup> "It is laid down that the ship may be bound by the bill of sale; but it cannot be by parol...."

Minor exceptions aside, bills of sale had become a permanent feature of commercial transactions involving the sale and mortgage of ships. The commercial usages and judge-made law were amended by, and incorporated in, the "Registry Acts" of 1786 and 1794.<sup>17</sup> Non-compliance with the provisions rendered the bills of sale and other instruments null and void.

The condition of the ship was an important aspect of the law of sale. A vendor was required to fulfil a duty half-way between the utmost good faith and strict liability. He was under a mandatory obligation to disclose fully all the defects. Lord Kenyon greatly increased the onus of a vendor where he was aware of the defects.<sup>18</sup>

13. Addis v. Baker & Others (1792) An Struther's Rep., vol. 1, 222, p. 224. Property in a ship would also pass by capture and condemnation as lawful prize by a court of competent jurisdiction.

14. Mestair v. Gillespie (1805) Ves. Jr. (1805-1806), vol. 11, 621, p. 627.

15. Ves. Jr. (1812-1817), vol. 9, 473.

16. Ibid, p. 475.

17. 26 Geo. III, c. 60 and 34 Geo. III, c. 68, respectively.

18. Mellish v. Motteux (1811) Peak. 156.

Thus in such cases, the offer for sale of a ship, with all faults and without warranty, was held insufficient to exonerate the vendor from the duty of disclosure. In the later case of Baglehold v. Walters,<sup>19</sup> the doctrine propounded by Lord Kenyon was not followed. The plaintiffs bought two-thirds of the ship "with all faults." In giving judgment for the defendants, Lord Ellenborough laid down a more equitable principle. Where a ship was sold with all faults, the seller was not liable for not disclosing any latent defects known at the time of sale, unless he had used some device to conceal them. This principle would not avail a seller where there was fraudulent misrepresentation as to the condition, description or nature of the subject matter. In Schneider v. Health,<sup>20</sup> the vessel and her stores were sold "with all faults...without any allowance for weight, length, quality, or defect whatsoever." After the purchase, the ship's bottom was found to be worm-eaten, her keel broken, and she was quite unseaworthy. In that dilapidated condition, she was not a vessel but a wreck! She by no means corresponded to the description used by the vendor. Mansfield, C.J., who gave judgment for the plaintiff vendee, said:<sup>21</sup>

"...if the seller was guilty of any positive fraud in the sale, these words (of exemption) will not protect him. There might be such fraud, either in false representation, or in using means to conceal some defect."

The decisions show the pioneering role of judges. They laid down rules which sought to provide a reasonable balance between the freedom of contract and the protection of innocent buyers of ships. As the ratio decidendi of each case depended on the judge and policy considerations the law imported into the colonies would accordingly be affected.

An issue closely related to the subject was raised before the High Court of Admiralty. Probably for the first time, in 1822, a master's authority to sell a ship was considered. In The Patridge,<sup>22</sup> the ship struck a shoal in the Bay of Bengal. The damage sustained was not surveyed. There was no authority from her owner and no necessity for the sale. The sale was held to be void. It could only be valid, if, with knowledge of all that the master had done, the owner had subsequently ratified and confirmed the sale.

19. (1811) 170 E.R. 1338.

20. (1813) 170 E.R. 1462.

21. Ibid, p. 1463.

22. (1822) 1 Hag. Adm. 81.

An inference having a bearing on the duty of seller may be drawn. In the absence of necessitous circumstances justifying the sale, prior authority or subsequent ratification, a master had no right to effect a sale. It followed, therefore, that the owner was not bound by any false representation or concealment of defects made by a master, who was purporting to sell her.

## 2. Rights of Part-owners

It had been a practice for a ship as a valuable chattel to be divided into sixty-four shares. Before the advent of limited liability companies, those shares, more often than not, were held by different persons as part-owners. Frequently, the part-owners were not unanimous in their decision regarding the employment of the ship. In dealing with disputes between the majority and minority part-owners, courts often had to lay down rules which determined how far the interests of individual part-owners should be protected. The remedies available would in turn depend on the application of those rules.

In 1684, an interesting case<sup>23</sup> came before the Lord Keeper in the Court of Chancery. Without the consent of the third part-owner, two of the three part-owners went ahead to have the ship fitted out for a voyage. The ship was lost at sea. Based on the concept of equity, the court approached the problem by examining how the profits earned would be distributed. Thus a part-owner's right to receive a share of the profits meant he would have to bear a corresponding proportion of the loss. Rules covering two alternative situations were laid down.

- (i) The two part-owners had obtained from the High Court of Admiralty an order. It permitted them to navigate the ship despite the refusal of the third part-owner, and to keep all the profits to be earned. In this case, the loss of the ship would fall entirely on the two part-owners.
- (ii) The third part-owner had refused to have the ship fitted out for the voyage. But he was entitled to a share of the profits to be earned. In this instance, he would bear a proportion of the loss.

23. Strelly v. Wenson 1 Vern. 298; [1] Eq. Ca. Ab. 7 plo. 12, 372, pl. 1. In this case, the loss of the ship was to be borne equally by the three part-owners. However, in Robinson v. Thompson (1687) 1. Vern. 466, the Lord Chancellor applied a different rule with regard to profits. The major part-owners were held to be entitled to settle and agree on the amount of the profits of a voyage.



In this case, the third part-owner was held to come within the second alternative.

It is clear that equity had recognised part-owners as tenants in common. Each of them was entitled to make an independent decision on the employment of the ship. Once that stage was reached, further developments followed. Part-owners were recognised as having proprietary rights to the ship. This principle enabled the courts to grant wider protection. Suppose the ship's master and chief part-owner insisted on taking the ship out against the will of the minority part-owners. In around 1745, the latter could, by an action in rem, have the ship arrested, and compel security to be given before permitting her to leave port.<sup>24</sup> An alternative to the action was to obtain in the High Court of Admiralty a stipulation from the majority part-owners for her safe return.<sup>25</sup>

The increasing protection given by courts was the result of the growing importance attached to ship-owning and maritime trade. This is seen as part of the British policy to encourage investments and enterprise in the shipping industry in England and the colonies overseas. Later, when partnerships and corporations were formed solely to operate or own ships, those problems hardly arose.

The nature of the contractual right of part-owners was considered by Abbott, C.J. In John Card and David Cannan v. William Hope,<sup>26</sup> A and B as managing owners, holding nine-sixteenths of the shares of a ship, by deed sold five-sixteenths of the shares to C. The deed empowered A and B to continue with the management and to be employed as C's agent in managing the ship. Under the deed, C was appointed to the ship's command. He could not sell the shares except on the condition that the purchasers would abide by the same stipulations and would not remove A and B. The court held that the covenant on C's part to engage A and B as agent in the ship's management was lawful if it stood alone. However, as the covenant was founded on contract for the sale of shares and for the appointment to the ship's command and the continuance of the management, it was invalid and unenforceable. It was contrary to the interests of the East India

24. Ouston v. Hebden (1745) 1 Wils. K.B. 101. A similar principle was applied in Lambert v. Aeretee, 1 Raym. Ld. 233.

25. Degrave v. Hedges, 2 Raym. Ld. 1285

26. (1824) 2 B. & C. 661.

Company, as charterers, and to the other part-owners. The Court gave judgment for C.

The decision is to be applauded. It is consistent with the valuable rights enunciated by courts in connection with part-ownership. To allow the minority shareholders a power of management of the ship based on provisions in a deed would undermine the progress made in the past decades. If left unchecked, the practice would result in the rights of part-owners being encumbered and eventually rendered valueless.

### 3. Masters as Agents

Late in the first half of the eighteenth century, English courts had to adjudicate upon the scope of a master's authority. As fortuitous events encountered on a voyage were often unpredictable, the master was not empowered beforehand to act in every emergency. Two underlying questions had to be resolved. How far were shipowners bound by the acts of a master arising in contract or quasi-contract? When would a master be regarded as an agent of necessity? The circumstances justifying a master to so act were stated by Lord Chancellor Hardwicke in Buxton v. Snee:<sup>27</sup>

"Certainly by the maritime law, the master has power to hypothecate both ship and cargo for repairs & c. during the voyage; which arises from his authority as master, and the necessity thereof during the voyage; without which both ship and cargo would perish; therefore both that and the law of this country admit such a power."

In the interests of the owner, certain limits were imposed. Thus no such authority was held to exist if the ship was in her home port. Nor would repairs effected on a ship in her home port, based on the master's order, create a lien on her.<sup>28</sup>

The master's authority was later extended to include the receipt of stores and money. In Rocker v. Busher,<sup>29</sup> Lord Ellenborough, C.J., held that the owner of a vessel was liable to a person who had supplied articles or advanced cash to the captain of the vessel in circumstances where she had entered a foreign port in distress.

27. (1748) 1 Ves. Sen. 155. No such power existed when the ship was in her home port.

28. Watkinson v. Barnardiston 2 P. Wms. 367.

29. 1 Starke 26.

In a number of ways, the judges of Common Law Courts, the Court of Chancery and the High Court of Admiralty had separately contributed to the protection of foreign creditors and financiers. The case of Farmer v. Davies<sup>30</sup> was heard by Lord Mansfield, C.J., who was well known for his role in incorporating law merchant as part of common law. He held that where, for the benefit of the ship, credit was given to her owners, the creditor had a "specific lien" on the ship. As the report makes no mention of the nature of the lien one could not conclude that it was a maritime lien. It was probably a right which gave the holder a charge on the ship. The lien or charge was intended to place such a creditor in a better position to be paid out of the proceeds of sale of the ship than the other claimants. This common law rule was thus another addition to the pre-existing remedies. In the earlier case of Sansum v. Bragginton,<sup>31</sup> the Court of Chancery had laid down rules which operated in personam. After a ship was repaired, refitted and supplied by the plaintiff for the homeward-bound voyage, she was captured. It was held that, where a ship was hypothecated for repairs done abroad and afterwards lost, the part-owners were liable personally as if they were partners. Their liability could extend beyond the value of their respective shares and interests in the ship. Thus the personal assets of the part-owners, like those of the members of a partnership, were subject to the claims of their creditors.<sup>32</sup> But as the personal liability imposed was based on ownership or equitable interest in the chattel, it could be rebutted. This was done by proof that, before repairs were effected on the ship, he had parted with the beneficial interest therein and had ceased to be involved in her management.<sup>33</sup>

30. (1786) 99 E.R. 1000.

31. (1750) Ves. Sen. Supp. 189.

32. Rich v. Coe et. al (1777) 2 Cowp. 635, p. 640, per Mansfield, C.J.

33. Jennings v. Griffiths (1824) Ry. & Mood 43 Cf. Flower v. Young (1812) 170 E.R. 1368, where an action was brought for stores supplied to a ship. If the defendant pleaded in abatement that he was only jointly liable with the others, it was held to be insufficient for him to produce merely the ship's register.

A special form of maritime security, which had come into common use before 1746, was the bottomry bond. As we shall see, the rights of the holders of such security were protected by a statute of George II.<sup>34</sup> The security was referred to as "bottom-ree or respondentia bond." Its use was clearly a move by the Legislature to avoid the principle of unlimited personal liability established in Sansum v. Bragginton.<sup>35</sup> Unlike an ordinary hypothecation, it was executed under seal containing the clause: "The lender of the money shall bear the risk of the voyage and the principal and interest shall be at stake upon it." Although the owner was not personally liable beyond his interests in the ship, the sympathy of the court of equity was on the side of the lender! In Ladbroke v. Cricket,<sup>36</sup> further protection was granted for bottomry bonds. All the four common law judges held that, where a bottomry bondholder had taken possession of the ship, she could no longer be seized by way of execution initiated by another creditor. Some fourteen years later, for commercial reasons, the status of such bonds was enhanced to cover the ship and the earnings of a subsequent voyage. This rule was stated in the High Court of Admiralty by Sir W. Scott. In the Jacob,<sup>37</sup> the bond given in America was expressed to bind the ship and freight which was not defined. Although it described a voyage from Baltimore to Cork, the ship arrived at Dublin, discharged her goods, and sailed to England. The judge held that, as the proceeds of the sale of the ship were insufficient, the freight earned on a subsequent voyage was included to meet the bondholder's claim.

To save the expense of keeping the crew on board, the same Court recognised the issue of a bottomry bond to a person who undertook to pay the crew off. For reimbursement, he was given a lien on the proceeds of the sale, entitling him to priority over other claimants.<sup>38</sup>

34. Statutes at Large, 15-20, Geo. II, vol. 18, chap. 32, infra.

35. (1750) Ves. Sen. Supp. 189, supra.

36. (1788) 2 T.R., 649.

37. (1802) 4 C. Rob. 245.

38. Kammerheire v. Rosenkrants (1822) 1 Hag. Adm. 62.

By "the operation of law acting upon an emergency and unprovided necessity," a master was given the authority to execute bonds on behalf of the shipowner.<sup>39</sup>

The decisions are seen as part of a wider Empire-building policy. By statute, British ships were permitted to trade mainly between Britain and her colonies, and also between the colonies. One effective way of enhancing British maritime power and interests overseas was active colonial participation. The protection given to bondholders and suppliers of stores and cash to British merchant vessels would attract massive colonial investments. Britain took the lead in providing ships, trade incentives and expertise, while the colonists responded by raising the finance. For the resources to be protected, the settlers in Australia and elsewhere had to apply, and operate within the context of, British laws. Such involvements were calculated to strengthen the relationship between Britain and her colonies.

#### 4. Personal Liability of Master

The position of a ship's master is considered from a different aspect. Good intentions on his part, expediency and necessitous circumstances would not justify any act done in excess of his authority. The law on the subject comprised rules enunciated by the Court of Chancery and common law judges in the eighteenth and early nineteenth centuries.

Equity was not slow to fasten its constructive trust doctrine on the conscience of a person exercising the authority of a master. An interesting case<sup>40</sup> came before Lord Keeper Harcourt in 1711.

The ship's master died during the voyage, leaving £800 which he had intended to invest in trade. A mate, who took over responsibilities as captain, invested the money, and made a great profit. Although allowance was made for his care and management of the money, he was held to be "more like a trustee than an executor." He was required to account for the profits made, and not just for the interest received.

39. The Zodiac (1825) 1 Hag. Adm. 320, 362, per Lord Stowell.

40. Brown v. Litton (1711) 1 P. Wms. 140.

In an unprecedented move, the Court of King's Bench exercised its authority by rejecting a custom in the seafaring industry. In Blainfield v. March,<sup>41</sup> a seaman died in the course of the voyage. The captain, in accordance with a usage, took all the deceased's goods and sold them at the ship's mast. He made an inventory of the goods sold and the sums received, and delivered them to the administrator on his return. Holt, C.J., held that the usage was "void." Both in the eighteenth century and today, the decision would be supportable on several grounds. Certainly apart from public policy, the goods and possessions of a deceased seaman should be disposed of according to his wishes. But if foul play was suspected, they should be retained for the purpose of coronial inquiry.

In a 1793 case<sup>42</sup> the court protected the interests of cargo shippers by imposing personal responsibility on the master. He was adjudged liable in an action on the case for the value of the goods which he had received for carriage overseas. They were stolen from the ship while she was lying in the River Thames. The decision, central to the promotion of maritime trade in the British Empire, was endorsed twenty-three years later by Gibbs, C.J.<sup>43</sup> There the master of a storeship in the king's service took on board a bullion belonging to a merchant for carriage from Gibraltar to Woolwich. He was held liable for the loss of the valuable cargo.

The question as to when a master could render himself liable to the mariners for their wages arose in Forsboom v. Kruger.<sup>44</sup> While proceeding on a voyage, the ship was wrecked. The captain gave to a crew member an order drawn upon the shipowners for a sum of money payable as wages. Lord Ellenborough held that, until a demand had been made upon the owners pursuant to the order, an action for wages was not maintainable against the master.

41. (1796) vol. 7 Mod. Rep. 141.

42. Mors v. Sluce (1793) 1 Mod. Rep. 85.

43. Hatchwell v. Cooke (1816) 6 Taunt Rep. 577.

44. (1812) 170 E.R. 1353.

The decision in Thompson v. Finden<sup>45</sup> underscored the doctrine of freedom of contract. Generally, shipowners were legally bound to pay for repairs done on, or supplies delivered to, the ship. To this rule, Tindal, C.J., had created a noteworthy exception. A master would be held personally answerable if it was proved that the nature of the dealing was such that the goods supplier looked exclusively to the master who had instructed the supplies to be delivered. The exception may be seen as judicial endorsement of laissez-faire.

#### 5. Salvage

The law of salvage was developed mainly by the judges of the Common Law Courts, the High Court of Admiralty and the Court of Chancery. Little formal reliance had been placed on the maritime usages of civil law countries.<sup>46</sup> Sir Christopher<sup>47</sup> favoured an equitable remuneration for services rendered. This was a bold departure from the rule of making awards based on a proportion of the value of the ship saved - "a course of proceeding familiar enough in ancient times."

From early days, the decisions were consistently geared towards the encouragement of salvage services. This element was no doubt an integral part of the British shipping policy. The principles laid down by Holt, C.J., in a pre-1788 case are central to the subject. The defendants in Hartfort v. Jones had risked their lives in saving the goods from a fire which broke out in a ship. They refused to part with them unless they were paid salvage. In dismissing the action of trover brought by the owner against them, Holt, C.J., said:<sup>48</sup>

"[T]hey might retain the goods until payment...  
And salvage is allowed by all nations, it being reasonable that a man shall be rewarded who hazards his life in the service of another."

The rule crystallised that a person entitled to salvage had a possessory lien upon the property saved for payment. Judicial awards for beneficial work performed beyond the call of duty were made to further this aspect of the policy. Thus redemption of goods by the master from pirates, who had captured the ship, was recognised as a species of salvage.

45. (1829) 172 E.R. 651.

46. K.E. Roberts says: "Maritime salvage can be traced to Rhodian law, the maritime codes of the Mediterranean seaport cities and the sea laws of the Baltic regions." "Sinking, Salvage, and Abandonment" (1977) 51 Tul. L.R., p. 1197.

47. Salacia (1829) 2 Hag. Adm. 262.

48. 1 Raym. Ld. 393.

He was afforded a possessory lien.<sup>49</sup> Sir W. Scott extended maritime property to include freight saved. It was essential that freight was in the course of being earned and the voyage was afterwards completed.<sup>50</sup> In "The Aquila,"<sup>51</sup> he held that salvage reward for finding a derelict was much in the discretion of the court. He refused to follow the ancient rule of granting a moiety de jure to the finder.<sup>52</sup>

In the early nineteenth century, a significant decision was made. The High Court of Admiralty held that a salvor's right to remuneration was not affected by relinquishing possession of the goods saved.<sup>53</sup>

A concept of antiquity was that only ships' masters and crews could qualify as salvors. Towards the end of the eighteenth century, probably due to a change in philosophy, non-mariners were also entitled to salvage reward.<sup>54</sup> An initial breakthrough came in The "San Bernardo".<sup>55</sup> The Court held that the owners of the salvaging vessel had "no great claim." Their rights, however, were given "the equitable consideration of the Court for damage or risk, which their property might have incurred." In evaluating the exertions of non-mariners, the courts applied a somewhat new criterion. Thus in Newman v. Walters,<sup>56</sup> a strong Court of Chancery recognised the services of a passenger to be of sufficient merit for the purpose of salvage.

In 1801, a new type of claim, viz. military salvage, came to be heard before Sir W. Scott.<sup>57</sup> Due to bad weather and her leaky condition, a British vessel laden with cargo was compelled by her crew to

49. Anonymous (1796) 11 Mod. Rep. 6.

50. The "Dorothy Foster" (1805) 6 C. Rob. 88.

51. (1798) 1 C. Rob. 37. This rule was followed in later cases.

52. As to remuneration imposed on goods by statutes in favour of salvors, see R.G. Marsden "Admiralty Droits and Salvage - Gas Float Whitton, No. II" (1899) 60 L.Q. R. 353.

53. Eleanora Charlotte (1823) 1 Hag. Adm. 156.

54. As to present position, see K.C. McGuffie, Kennedy's Civil Salvage (4th ed. 1958), pp. 124 et. seq.

55. (1799) 1 C. Rob. 177.

56. (1804) 3 Bos. & Pul. 613.

57. The Franklin (1801) 4 C. Rob. 146.



put into an enemy port. She was saved by a British cruiser from certain capture and confiscation. The rescuers brought her and her cargo safe into another port. These services were accepted by the High Court of Admiralty to be of sufficient merit for salvage reward.

Subsequent decisions were consistent with the "merit" test. The courts were not deterred from making awards where the salvaging ship and the ship saved belonged to the same employer.<sup>58</sup>

Inherent in the salvage awards made was the public policy to encourage exertions on humanitarian grounds for the rescue of life and property. However, judicial pronouncements were made on a number of disentitling factors. In the following situations, no salvage award would be made in X's favour:

- (i) Some Malay mutineers had fallen upon the master of the ship and taken possession of her. The ship and cargo were later rescued by the ship's own crew (X).<sup>59</sup>
- (ii) Under an agreement certain ships were to sail as consorts and to provide mutual assistance. Pursuant to the agreement, salvage operations were rendered by one or more of the ships (X).<sup>60</sup>
- (iii) A commander allowed his men to carry out salvage work using the ship's boats. He (X) was not actually involved in the salvage operations.<sup>61</sup>
- (iv) A barge without anchor or crew was found at a spot at sea where it was common to leave barges. The finder (X) brought her back to port.<sup>62</sup>
- (v) While carrying goods to market, a ship rendered salvage services for which the sum agreed was paid. Due to the delay entailed, the goods carried had depreciated in value. The owners (X) of the ship sought to recover a further sum as consequential loss.<sup>63</sup>
- (vi) Before a vessel in distress could be salvaged, temporary repairs, including caulking, had to be done to her. A sum was paid for salvage. The salvor (X) claimed a further amount for the temporary repairs.<sup>64</sup>

58. "Waterloo" (1820) 2 Dods. 432.

59. "Governor Raffles" (1815) 3 Dods. 13.

60. Zephyr (1827) 2 Hag. Adm. 43.

61. Vine (1825) 2 Hag. Adm. 1.

62. Upnor (1826) 2 Hag. Adm. 3.

63. Mulgrave (1827) 2 Hag. Adm. 77. It was probable that the rule might not apply in the absence of the agreement.

64. Rainger (1827) 2 Hag. Adm. 42.

## 6. Collision at Sea

It is relevant to consider the position where loss or damage was sustained in a collision between two ships.<sup>65</sup> Early in 1797, the case of Sedgworth v. Overend<sup>66</sup> came before the Court of Chancery. A ship jointly owned by two persons was negligently damaged in a collision. A strong court held that the part-owners, as tenants in common, could each in a separation action sue the defendant for the damage caused to his share of the property. This harassing procedure was not open to a plaintiff if the defendant, when first sued by a part-owner, had pleaded an abatement to the action.

At the start of the nineteenth century, the principle of vicarious liability for collision damage due to negligence was established by the Court of Common Pleas. It was held that shipowners who supplied the crew on board the ship, which was adjudged to be at fault, would be *prima facie* liable. The presumption was not rebutted by the fact that at the time of collision she was chartered to the Commissioners of the Navy and had on board a commander and a King's pilot.<sup>67</sup> There were two grounds on which the application of the principle in the circumstances could be supported. It was impossible for the plaintiff to ascertain whether the collision arose from the negligent acts or defaults of the crew or those of the naval officer. The matter as between the shipowners and the Commissioners of the Navy could later be settled.

The judgment in The "Woodrop-Sims"<sup>68</sup> laid down the law with unusual clarity. Sir W. Scott classified the causes of collision in four situations and declared the rules as to liability. He explained:<sup>69</sup>

65. As to rule relating to division of loss under the Laws of Oleron, see K.C. McGuffie, The Law of Collisions at Sea (11th ed. 1961), para. 161.

66. 7 T.R. 278.

67. Fletcher v. Braddick (1806) 2 Bos. & Pul. (N.R.) 181.

68. (1815) 3 Dods. 82. The classification into the four possibilities by Sir W. Scott was approved by the House of Lords in Hay v. Le Neve 2 Shaw's Scotch Appeal Cases, p. 395.

69. (1815) 2 Dods. 82, 85.

"In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other vis major: in that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: in such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case, the injured party would be entitled to an entire compensation from the other."

For the damage caused, The "Woodrop-Sims" was held solely to blame. The reason for the decision and the rule of navigation which applied to sailing vessels were stated by the High Court of Admiralty. "The law imposes upon the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel that is close-hauled, and of showing that it has done so, if not, the owners of it are responsible for the loss which ensues."<sup>70</sup> In its application to steam vessels the rule was modified. Thus in the case of Shannon, decided in 1828, two vessels, the Shannon (a steam vessel) and the British Union, while coming from opposite directions, collided in a channel. The court held that the Shannon alone was blamable for the damage. The judge said:<sup>71</sup>

"...the rule of navigation should be applied according to the character of the two vessels... Steam boats from their greater power ought always to give way...also being satisfied that the Shannon had seen the Union...the Shannon was to blame."

The judicial pronouncements were no doubt observed as rules for the safety of navigation on water. They existed before the international regulations for the prevention of collision at sea were formulated.<sup>72</sup>

Prior to the passing of the Australian Courts Act, 1828 (Imp.),<sup>73</sup> a new issue was raised before Lord Stowell. It had never been determined whether consequential loss could be tacked onto and recovered as part of the claim for collision damage. The "Minerva," while assisted by the "Flora" in towing a foreign vessel, was run down by the

70. The "Woodrop-Sims", *ibid.*, 87. This rule was followed at nisi prius in the later case of Handaysyde v. Wilson (1828) 172 E.R. 532.

71. 2 Hag. Adm. 173, pp. 174-175.

72. For effect given to early collision regulations in New South Wales, see Chapter Two.

73. 9 Geo. IV, c. 83, *infra*.

"Betsy Caines."<sup>74</sup> There was evidence of an agreement to pay the "Minerva" the sum of fifty pounds for salvage. The collision had incapacitated her from completing the work. Consequential loss was allowed by the High Court of Admiralty as part of the claim.<sup>75</sup>

#### 7. Wages of Seamen

To poor seamen seeking redress from economic oppression, the High Court of Admiralty was the "court of equity and conscience." The current of decisions, which upheld seamen's rights to their wages, seemed to be based on a biblical precept that the "labourer is worthy of his hire."<sup>76</sup>

In The Countess of Harcourt,<sup>77</sup> the mariner was engaged to sail from "the port of London to Van Diemen's Land and...back to London." On the ship's return to London, the captain had directions to proceed to Rotterdam. Lord Stowell held that the seaman's refusal to work during the continuance of the voyage to Rotterdam was not a desertion of his duty. It would not, therefore, give rise to a forfeiture of his wages. A seaman was not bound to accede to an alteration of the voyage.

In the early days of merchant shipping, virtually no deviation from the articles signed by seamen would be permitted. Where under the articles a person was bound to serve on board as seaman for certain wages, he would be unable to maintain an action against the master for extra wages if he acted as a cuddy servant.<sup>78</sup> It was questionable whether an exception would arise if there was an agreement to pay additional wages. This rigid rule had stemmed from an old Court of Common Pleas decision in White v. Wilson.<sup>79</sup> It was based on the premise that where a person had, by articles, agreed to serve for certain

74. (1826) 2 Hag. Adm. 28.

75. Later, it was in the court's discretion to decide whether an item of loss arising after collision was recoverable as damages in the action: The Maid of Kent (1881) 6 P.D. 178.

76. St. Luke's Gospel, chapter 10, verse 7.

77. (1824) 1 Hag. Adm. 248.

78. Dafter v. Creswell (1826) 172 E.R. 73, per Abbott, C.J.

79. 2 Bos. & Pul. 116.

wages he could not ask for more. Its injustice led the High Court of Admiralty to adopt a more rational approach to the problem. One of the first inroads on the doctrine was made in 1825. In The Providence,<sup>80</sup> the second mate was directed to take over the duties of chief mate. No alteration was made to the remuneration and articles signed, and he continued with a second mate's pay. Lord Stowell held he was entitled to be paid on quantum meruit for the work done as chief mate. This decision meant that a master's refusal to make the alteration would not prejudice the enforcement of a seaman's claim. Another departure from the strict adherence to the articles was reflected in The Harvey.<sup>81</sup> In the schedule to the ship's articles, Thomas was entered as the second mate on the voyage to Van Diemen's Land and New South Wales and back to Great Britain. But no rate of wages was affixed to his name. The court permitted parol evidence of the agreement to be given.

Attempts by the ship-owning class to exploit seamen and forfeit their wages met with little success. The courts had often extended the rights of seamen who would otherwise be placed at the mercies of the masters and the fortuitous circumstances. In Train v. Bennett,<sup>82</sup> a seaman sued the shipowner for wages. The articles provided that the seamen's wages would be forfeited if they neglected their work, or refused to obey the lawful commands of their superiors. The court found that the master had acted improperly and had kept him at work in such circumstances as would waive a previous forfeiture. In giving judgment for the plaintiff seaman, Lord Tenterden, C.J., said:<sup>83</sup>

"Now a master of a ship is not, by his own conduct, to induce a forfeiture of the men's wages; and if you think the captain acted improperly in refusing to say whom he would knock off, or in obscurely saying that he would knock several of them off, and the plaintiff...refused to work, I think that then, in point of law, the wages are not forfeited."

80. (1825) 1 Hag. Adm. 391.

81. (1827) 2 Hag. Adm. 77.

82. (1827) 172 E.R. 296.

83. Ibid., p. 297.

The courts were concerned with building up a uniform body of rules which governed the rights of seamen throughout the realm, including the colonies. Local port customs and usages affecting the interests of seamen were narrowly construed. In an early nineteenth-century case,<sup>84</sup> the court had to consider the effect of an established port custom. Thus all seamen entering into articles were bound to continue in the ship's service until the delivery of the cargo and full completion of the voyage. Lord Stowell held that such a custom would not prevent a seaman from leaving the ship on legal grounds. Therefore, desertion from a ship on the ground that the captain failed to provide him with food would not cause a forfeiture of wages.

In a bold attempt, Lord Stowell came to grips with fraudulent acts which had harassed seamen for centuries. He struck down as invalid stipulations in the articles which were harsh or believed to have been inserted without the seamen's consent. In the Minerva,<sup>85</sup> the words "to New South Wales and India, and to return to port" were visibly written in the articles signed by the plaintiff seamen. Later, on a close inspection, it was found that the words "or elsewhere" were obscurely written after the word "India." The shock this gave the crew and their dissatisfaction with the captain's conduct caused twelve of the mariners to leave the ship at Calcutta. The court found that the ship-owners and the master had exploited the illiteracy and unequal position of the seamen. The seamen had signed contracts which embodied the provisions and penalties of two Acts.<sup>86</sup> Thus the terms of the articles were rendered "binding and conclusive." Judgment, however, was given for the seamen. Lord Stowell said:<sup>87</sup>

...the Court of Admiralty, being a Court of Equity, will consider how far those engagements are reasonable or not... I find great difficulty in persuading myself, under these principles and these authorities, that such special engagements can be imposed upon these men as binding and conclusive, though directly contrary to all natural justice, and to the known principle of maritime law...."

84. The Castilla (1822) 1 Hag. Adm. 59.

85. (1825) 1 Hag. Adm. 347.

86. 2 Geo. II, c. 36; 37 Geo. III, c. 73.

87. (1825) 1 Hag. Adm. 347, p. 357.

The extending role of the Court of Admiralty as guardian of the rights of seamen is further exemplified. In The New Pheonix,<sup>88</sup> the master sought to forfeit a seaman's wages on grounds of drunkenness. Lord Stowell gave judgment for the seaman. It reflected judicial sympathy for the lot of seamen. Lord Stowell took into consideration not only the occasion when the intemperate excess occurred but also the conduct of the master. There was proof "that on all occasions he conducted himself in a sober and orderly manner; and that the master, upon the most trivial occasions, gave way to violent fits of passion, and frequently struck and cruelly maltreated him." Moreover, the defence of desertion would fail unless there were signed articles given as evidence of the contract with the mariner and of the time of making the contract.<sup>89</sup>

Another of the notable judicial pronouncements in favour of seamen was added in Le Loir v. Bristow.<sup>90</sup> In some ways, an inviolable character was conferred on a seaman's right to his wages. The plaintiff seaman sued for the balance of his wages. He admitted that through his negligence he had lost certain articles of value entrusted to his care, and that he was liable to pay for them. Lord Ellenborough refused to allow the defence plea of a set-off, unless it was proved to be part of the original contract that wages would be paid only after deducting the value of chattels lost. The decision greatly prejudiced the legal position of an employer of seamen. It took away the implied right of an employer to be reimbursed in respect of loss caused by the negligence of his seamen.

It had long been the policy of courts to give seamen the benefit of the doubt. Disruption of the work of seamen while in a foreign port, probably not as a result of their fault, would not in certain circumstances deprive them of their wages. In one case,<sup>91</sup> while in a Russian port, the crew were taken out of the ship and imprisoned. The court held that they were entitled to be paid their wages, if on release they

88. (1823) 1 Hag. Adm. 198.

89. The George Banifer (1823) 1 Hag. Adm. 168. In Hillyard v. Mount (1823) 172 E.R. 338, the articles provided a seaman would lose his wages if he failed to return to London with the ship. He was discharged during the voyage. Lord Tenterdon, C.J., held he was entitled to be paid a reasonable remuneration for the services rendered.

90. (1815) 171 E.R. 43.

91. Delamainer v. Winteringham (1815) 171 E.R. 60.

returned to the ship and completed the voyage. They were deemed to have worked and laboured for the shipowner from the commencement to the conclusion of the voyage.

We have looked at judicial developments relating to the recovery of seamen's wages. Early law took cognizance of the effect which the bankruptcy of shipowners or the loss of the ship would have on seamen.

In an unusual pre-1823 case,<sup>92</sup> a spinster brought a claim for wages before Lord Stowell. She had worked on board a ship firstly as a cook and steward, and secondly as a keeper of the ship and her stores. The shipowner having become bankrupt, the court held that she could pursue her claim against his estate. Nowhere does the report mention that her claim had any priority over the other claims. Probably she was not paid in full.

The implication of the ancient maxim "freight is the mother of wages" was examined in The Neptune.<sup>93</sup> Would the maxim disentitle a seaman from receiving wages if no freight was earned? The ship, driven by a gale, stranded upon the French coast. Through the extreme exertions of the plaintiff and the other seamen, certain parts of the ship were saved. Evidently, the proceeds of sale of those parts constituted the only fund for paying the seamen's wages. Lord Stowell found for the seamen. It meant the end of the curious maxim. The court recognised the seamen's wages as giving rise to a right which attached to the ship, on which they were employed, as a res. Lord Stowell placed seamen's wages on the same footing as those of their European counterparts. He said:<sup>94</sup>

"The practice, at least the modern practice of great maritime states, shows a repugnance to the application of this particular rule, of total forfeiture of wages where

92. Jane & Matilda (1823) 1 Hag. Adm. 187.

93. (1824) 1 Hag. Adm. 225. This decision was followed in "The Warrior" (1862) Lush. 481; approved in "Le Janet" (1872) L.R. 3 Ad. & Ecc., 559.

94. (1824) 1 Hag. Adm. 225, 233.



parts and fragments of the vessel are preserved that can be applied to a total or partial satisfaction of them. The French, a great maritime state, enjoin expressly in their celebrated Ordinances of Louis the Fourteenth, that they shall be so applied. By the Ordinance of Spain of 1563, when that country was at the zenith of maritime glory, the same practice was enjoined. In Holland, a country the most exclusively maritime, the Ordinances of Rotterdam prescribe it. Such is likewise the rule of the Danish Code...that if any part of the vessel is saved, the crew are to be paid out of the materials of the wreck which they have saved."

The insolvency of shipowners, as employers, generally brought hardships on seamen. Apart from the lack of financial resources to pursue their claims, seamen often had to compete with other creditors of their employers. One of the high-water marks of judicial contribution to the welfare of seamen has been the high priority given to the wage claims of seamen. The facts of The Flora<sup>95</sup> give an interesting insight into an important area of the law in 1824. W, a sole owner of a ship, was indebted to R, a general creditor. A writ of fieri facias was issued in the Court of King's Bench. After the ship was arrested by the sheriff and while she was in his custody, a suit for wages was instituted by the mariners. Consequently, she was also arrested by the deputy-marshall of the Court of Admiralty. After the ship was sold, the wages and costs were paid out of the proceeds of the sale. The surplus was held by the sheriff to await the outcome of the legal battle between the general creditor and the shipowner.

It is a corollary that the materials or necessities, e.g. ropes, tackle and provisions, supplied to a ship had never been rated on par with the services rendered by seamen. In The Maitland,<sup>96</sup> the ship was arrested in a suit for wages brought by seamen, and later sold.

95. (1823) 1 Hag. Adm. 198.

96. (1829) 2 Hag. Adm. 253. This decision was endorsed by the Privy Council in The Neptune (1835) 3 Knapp. 94.

The other creditors were a bottomry bondholder and the "necessaries" men. The proceeds of the sale were first used to pay wages. Sir Christopher Robinson ruled that the surplus was to "remain in the registry," as the other claims were disputed by the former shipowner.

By 1828 or thereabouts, a strong current of precedents had been built up for the protection of the vital interests of seamen. The case authorities were the result of judicial understanding, interpretation and implementation of the national policy of Great Britain. Prior to legislation assuming a major role, they paved the way for progress in maritime trade in the colonies and the Empire as a whole. As a monument to the work of judges, many of the rules have been preserved and codified by statutes.

#### 8. Claims of Material Men and Others

We shall consider the ranking of various claims brought by the creditors of shipowners.

A debt commonly incurred arose from the supply of material or necessities to the ship. In the early years, more from the influence rather than reception of civil law and foreign maritime laws, material men were given a lien on the ship and the proceeds of the sale. Thus in England, between the years of 1760 and 1833, the records show seven cases decided according to such influence.<sup>97</sup> Based on the orders of the Court of Admiralty, the material men were paid out of the balance<sup>98</sup> of the proceeds of the sale of ships, left in the registry.

However, a historic departure from the civil law trend occurred in 1835. The Privy Council in The Neptune "declared that the maritime courts had erroneously applied the doctrine of foreign maritime law to contracts made in this country (England)."<sup>99</sup> It denied that "material men ever had by the English maritime law, in respect of such contracts, any lien upon the ship, or any preference over any simple contract creditors." The balance of the proceeds of the ship sale was deposited in the court registry. The sum of over £361 together with costs was

97. The Neptune (1835) 3 Knapp. 94, 118-119 (P.C.) For the cases, see (1834) 3 Hag. Adm. 130, 150.

98. Ibid., 95. Decision of High Court of Admiralty taken on appeal to the Privy Council.

99. Ibid., 116.

pronounced to be payable to material men. H, to whom the ship was twice mortgaged, opposed the award. Pursuant to provisions in the mortgage deeds, H had taken possession of the ship before she was arrested and sold. In reversing the decree of the Court of Admiralty, the Privy Council held (inter alia):<sup>1</sup>

"...[T]he law of England never had adopted the rule of the civil law with regard to necessities furnished here in England. If then material men never had any lien on the ship itself, in respect of supplies furnished in England, how would they ever acquire a lien upon the proceeds of the sale of the ship."

The claims of material men appeared to have been relegated to actions in personam. They had to be pursued against the shipowner or the master in the jurisdictions where personal credit was given.<sup>2</sup> If the personal assets of a shipowner, including what remained after the meeting the claims of a ship mortgagee, were insufficient, material men had to bear the loss.

So far as the proceeds of the sale were concerned, the rule in The Neptune favoured the ship mortgagee. One avenue thought to be open to material men to recoup their outlay was considered in Jackson v. Vernon.<sup>3</sup> The plaintiff supplied the ship "Three Sisters" with cordage and stores in February and July, 1787. By a bill of sale, the ship was mortgaged to the defendant who later took possession thereof. The material men sought to recover from the defendant the value of the supplies made to the ship. It was alleged that the latter, who took possession of the ship, was also bound to defray the debts incurred. The court, however, drew a clear distinction between the defendant taking possession as mortgagee and the liability of the shipowner. It was held that, as the mortgagee was not the absolute

1. Ibid., 117, per Lord Hardwicke.
2. Admiralty jurisdiction in rem was exercisable under the Admiralty Court Act 1840 (3 & 4 Vic., c. 65), s.6, for necessities supplied to foreign ships.
3. (1789) 1 H. B.L. 114. By the Registry Act (4 Geo. IV, c. 41, s. 43) ship mortgagees were not deemed to be owners, except in so far as might be necessary to render the ship available for the payment of debt.

owner, he was not liable for the necessities provided for the ship before possession was taken.

In many situations, the law preferred ship mortgagees to other claimants. In the 1767 case of Gillespy v. Coutts,<sup>4</sup> the litigants were the mortgagees and one of the purchasers. The owner of eight-sixteenths of a ship mortgaged his shares to Coutts and Stephens, and later sold the same to different persons. The plaintiff, purchaser of two-sixteenths of the shares, took possession of the ship and got possession of the grand bill of sale. The names of all the purchasers were endorsed on the instrument, but without dates. Lord Chancellor Camden granted preference to the mortgagees on the following premise:

"...the plaintiff and the seven other purchasers are to be considered as standing in the place of Duncan Eyre (i.e. the owner), and took the shares subject to the debts due to Coutts and Stephens, and charged upon them by Eyre... there were no circumstances in the case sufficient to enable the plaintiff to any priority against the defendants Coutts and Stephens...."<sup>5</sup>

Once it was resolved that mortgagees had a better ranking than owners or part-owners, the application of the rule to those who derived their interests from the latter was simply a logical extension. The competing claims between a mortgagee and the assignees in bankruptcy were heard before three judges in Atkinson v. Maling.<sup>6</sup> By a grand bill of sale, executed on 16th March, 1785, the plaintiff was assigned a ship at sea as security. The ship mortgagor having become bankrupt, the plaintiff immediately took possession of the ship when she arrived in England. The assignees of the bankrupt took the ship from the plaintiff. There was no demand made on the bankrupt or his assignees to give up possession of the ship. As mortgagee under the bill of sale, the plaintiff succeeded in an action for trover against the bankrupt's assignees.

4. (1767) A.M.B. 652.

5. Ibid., p. 653.

6. (1788) 2 T.R. 462.

The judicial pronouncements in favour of mortgagees served to enhance the value of British ships as mortgage security. As mortgagees were not regarded as owners even where they had taken possession of the ship, the doctrine of British ownership remained intact. Inherent in the decisions may be seen the policy to expand the British merchant fleet involving the raising of finance from foreigners.

### III. UNENACTED LAW

We shall consider how maritime law was imported into the Australian colonies. In the years 1788<sup>7</sup> and 1828, English judges had already built up a body of unenacted rules. These rules had actually crystallised from decisions of the Common Law Courts, the Court of Chancery and the Court of Admiralty.<sup>8</sup> As the term "common law" is not defined to include all these rules, close attention is focussed on the reception process. One difficulty encountered is the lack of precision in the use of terms. Occasionally, an excerpt from a judgment may imply that the law transferred to a colony by settlement was not confined to the principles administered by the Common Law Courts alone. Dickinson, C.J., viewed the law received into the colonies as comprising natural law administered by British courts. He said:<sup>9</sup>

[T]hat natural law...has been discovered and declared from time to time by British courts as circumstances for its application arise in litigation. Of that law most propositions can be proved to be logical consequences from some principles or first truths of natural justice, appreciable by the ordinary intelligence of mankind. That law is so universal in its nature as to be applicable to all nations and in all times and being common to England and all other places is necessarily carried with them by Englishmen in coming to as colony like this; or, more properly speaking is found by them to exist in it equally as in the United Kingdom. No statute was necessary to introduce such law into this colony...."

7. 26th January, 1788, was presumably the date of settlement when the Union Jack was unfurled at Sydney Cove.
8. We have seen that maritime law was regarded by Lord Esher, M.R. as part of common law: The Chartered Mercantile Bank of India, London and China v. The Netherlands India S.N. Co. Ltd. (1883) 10 Q.B.D. 521, p. 537.
9. Ex parte The Rev. George King (1860) 2 Legge 1307, p. 1313.

Unfortunately, this view failed to take into account that part of maritime law had originated from the laws of Oleron<sup>10</sup> and ancient customs. As we have seen, often the rationes decidendi of case authorities were geared towards specific national policies. Rather than as norms of natural justice, the principles of maritime law were better regarded as judicial criteria for the settlement of admiralty or shipping disputes.

In Ex parte Nicholas,<sup>11</sup> Will. J., alluded to the imperialistic character and unlimited potential of English law. He said:<sup>12</sup>

"When the Court of King's Bench travelled into Scotland with Edward I, it administered justice in Scotland, not according to Scots law, but according to the law of England. It is manifest, therefore...that the laws of England are not so confined to that kingdom, but that there are circumstances in which they extend throughout the British dominions and even beyond them."

It is submitted that the use of the words "laws of England" is intended to imply not just the common law<sup>13</sup> but, subject to certain exceptions, the general body of English laws. By analogy of reasoning, it may be argued that the colonial judges were appointed by letters patent to administer such laws.

It has been stated in several cases that the colonists carried with them to the newly occupied territory the entire fabric of the common law. The expression "common Law" is either a misnomer or to be understood in a much wider sense. By the inviolable judicial "authority of Salkeld"<sup>14</sup> and the Privy Council decision,<sup>15</sup> it was promulgated:

10. Supra.

11. (1839) 1 Legge 123.

12. Ibid., p. 132.

13. Cf. view of Mason J. He held the words "laws...of England" in section 3 of the Act No. 9 of 1872 (S.A.) referred to the common law of England: State Government Insurance Commission v. Trigwell and Others (1978) 142 C.L.R. 617, p. 635.

14. Pages 411 and 666, referred to by Dowling J. in Rex v. Farrell, Dingle and Woodward (1831) 1 Legge 5, p. 16.

15. 2 P. Williams 75.

"That if an uninhabited country be discovered and planted by Englishmen, all the laws then in being, which are the birthright of every subject are immediately in there in force."

However, Sir William Blackstone<sup>16</sup> subjected the reception mechanism to "very great restrictions." According to him, the colonists carried with them only as much of the English law as was applicable to their own situation and the condition of an infant colony. In Rex v. Farrell, Dingle and Woodward,<sup>17</sup> the chief justice explained the selection mechanism. He said:

"What laws do or do not apply must necessarily be left to the local authorities to determine always subject to an appeal to the King in Council."

Based on the infancy of the settlement and the anomalous character of the society, the general proposition is that the laws of England could not be indiscriminately applied in the then conditions of the colony.<sup>18</sup> It clearly follows that the corpus of maritime law principles, discussed in the preceding pages, would not be imported in the year 1788. They were unsuitable in their nature to the needs, or could not be reasonably applied in the existing circumstances, of the colony at that date.<sup>19</sup> However, the Privy Council statement, re-stated by Sir William Blackstone, was subsequently given a wide ambit. In delivering the decision of the Privy Council in Cooper v. Stuart,<sup>20</sup> Lord Watson referred to Blackstone's classic proposition. He stated categorily:<sup>21</sup>

"If the learned author had written at a later date he would probably had added that as the population and wealth of the colony increase, many rules and principles of English law, which are unsuitable to its infancy, will gradually be attracted to it, and that the powers of remodelling it belong also to the colonial legislature."

16. Commentaries on the Laws of England (4th ed. 1876), vol. 1, p. 81, supra.

17. (1831) 1 Legge 5, p. 10, supra.

18. Duncan v. Mirrors Newspapers Ltd. (1978) 142 C.L.R. 585, p. 587, per Barwick, C.J.

19. Quan Yick v. Hinds (1905) 2 C.L.R. 345, pp. 356, 367.

20. (1889) 14 App. Cas. 286.

21. Ibid. pp. 291-292.

What Lord Watson probably meant was that that part of the English law which is suited to a more advanced territory lies dormant until the occasion arises for enforcing it.<sup>22</sup> Thus the significance of the above statement in relation to the subsequent reception of English maritime law must be seen in the light of subsequent increase in shipping and overseas trade in the colonies. Records<sup>23</sup> showed that in April, 1799, Governor Hunter was issued with instructions to keep a register of all "vessels as may arrive at or proceed from Port Jackson in the course of each year." Between 8th January, 1810, and 30th September, 1811, sixty-eight cargo ships from America, England, China, South Africa, India, etc., traded with Port Jackson in New South Wales.<sup>24</sup>

A number of crucial factors had combined to expedite the application of English maritime law to merchant shipping in the colony. The ships engaged in colonial and intercolonial trade were largely British ships and owned by British subjects. Britain consistently pursued a national policy of requiring British ships to employ her own subjects as mariners. In practice, the body of maritime law principles would seldom, if ever, be departed from in all dealings affecting shipping matters in the colony and the British Empire. Moreover, despite the restrictions placed by Blackstone on the reception mechanism, neither the colonial courts nor the colonial legislatures, subsequently established, sought to make unenacted English law yield to local circumstances prevailing in the colony.<sup>25</sup>

22. Duncan v. Mirror Newspapers Ltd. (1978) 142 C.L.R. 583, p. 590, per Barwick, C.J. View of Barton and O'Connor, J.J., in Delohery v. Permanent Trustee Co. of N.S.W. (1904) 1 C.L.R. 283, p. 291, endorsed.

23. H.R.A. Ser. I, vol. II (1797-1800), p. 341.

24. H.R.A., op. cit., pp. 321-433.

25. "The cases in which a principle of the common law has been held inapplicable to a settled colony are comparatively few. Indeed, some authorities speak as though the whole of the common law became applicable to a newly settled colony:" Falkland Islands Co. v. The Queen (1863) 2 Moo. N.S. 266, p. 273; Municipality of Pictou v. Geldert [1893] A.C. 524, p. 527. State Government Insurance v. Trigwell and Others (1978) 142 C.L.R. 617, p. 626, per Barwick, C.J.; see also A.C. Castles, "The Reception and Status of English Law in Australia" (1963) 2 Adel. L.R., p. 9.



The age-old concept of common law as the birthright of British subjects had an important part to play. It meant unity between England and the colonies in adopting and implementing a similar body of unenacted principles and also a common goal in the field of merchant shipping. This bond of harmony was greatly fostered, as an overt policy, by the Privy Council at the apex of the hierarchy of colonial courts. An example is found in Trimble v. Hill.<sup>26</sup> The Privy Council stressed the importance "that in all parts of the Empire where English law prevails, the interpretation of that law should be as nearly as possible the same." After the establishment of the Commonwealth of Australia, the policy of the Privy Council had been faithfully pursued by the High Court of Australia. The attitude of some judges towards the matter is reflected in the words of Dixon, J., in Waghorn v. Waghorn:<sup>27</sup>

"[W]here a general proposition is involved the court should be careful to avoid introducing in Australia a principle inconsistent with that accepted in England. The common law is administered in many jurisdictions and unless each guards against needless divergencies of decision its uniform development is imperilled."

There is another factor actively at work to preserve the unity of English and colonial laws. The continued operation in the colonies of those maritime law principles after the initial transfer and their subsequent development are largely due to the irreversibility of the reception mechanism. Once such principles became part of the law of a territory, they did not cease operation because changes in circumstances had later rendered them unsuitable. They continued in force until they were repealed or amended by legislation.<sup>28</sup>

One issue central to the subject of reception of English laws must be resolved. It is imperative that before maritime law could be imported into a colonial legal system there had to be judicial machinery in the colony to administer it. That raises a searching question. What courts in England exercised jurisdiction over shipping matters in the years 1788 and 1828? The High Court of Admiralty no doubt comes to mind. There were - as we have seen - at least three other courts,

26. (1879) 5 App. Cas. 342, p. 345.

27. (1941-1942) 65 C.L.R. 289, p. 297.

28. Duncan v. Mirror Newspapers Ltd. (1978) 142 C.L.R. 583, pp. 586-587, per Barwick, C.J.

viz. the Court of Common Pleas,<sup>29</sup> the Court of King's Bench<sup>30</sup> and the Court of Chancery.<sup>31</sup> These courts had contributed significantly to the development of maritime law. By the statute of 15 Richard II, chapter 2,<sup>32</sup> the High Court of Admiralty was prevented from exercising jurisdiction over contracts arising within the body of any county as well as on land. For example, it had no cognizance of mortgages of ships.<sup>33</sup> Moreover, where the agreements involved were special or under seal,<sup>34</sup> it had been prohibited from entertaining suits for seamen's wages. In such cases, the Common Law Courts and the Court of Chancery had unlimited jurisdiction.

Moreover, as an incident of legal history, certain maritime causes or matters could be dealt with by either the High Court of Admiralty or some other court. Thus by a statute of George IV,<sup>35</sup> the action could be heard in any of His Majesty's Courts of Record at Westminster or in the High Court of Admiralty. The option only applied where the damage was caused by a foreign ship to any British ship, boat or barge in a harbour or creek. Moreover, by section 31, "there shall be a concurrent jurisdiction between the Courts of Westminster and the High Court of Admiralty in cases of salvage rendered between high and low-water mark."

29. See e.g. 7 Taunton 258, referred to in The Christina (1828) 2 Hag. Adm. 185, p. 188.

30. For names of common law judges involved in shipping cases, see supra, including Abott, C.J. e.g. in Malton v. Nesbitt (1824) Hil. Term 4 Geo. IV 70; Tenterdon, C.J. e.g. in Bowden v. Fox (1830) Mich. Term 1 Will IV 150, etc.

31. For shipping cases decided by Lord Chancellors, see supra.

32. A.D. 1391.

33. The Portsea (1827) 2 Hag. Adm. 84.

34. Howe v. Napier (1766) 4 Burr. 1945.

35. (1821) 1 & 2 Geo. IV, c. 75, s. 32.

It is essential to consider whether the earliest "Court of Civil Jurisdiction" established under the First Charter of Justice<sup>36</sup> in New South Wales was competent to adjudicate upon maritime causes. The Letters Patent merely empowered the court to determine in a summary way "all pleas concerning lands, houses...and all debts, account or other contracts and all manner of personal pleas whatsoever." It is questionable whether, under the terms of the Charter, the Court was invested with any jurisdiction over shipping matters. Professor Castles argued that the "most important civil courts in New South Wales between 1788 and 1823 were not constituted legally." The grounds he gave were that there were important departures in the methods of operating such courts from the practice of English superior courts exercising civil jurisdiction and the absence of civil juries.<sup>37</sup> These grounds are suggestive of the somewhat restricted role of the colonial courts. It is unlikely that principles of maritime law would be administered.

Certainly an important channel of reception of English maritime law was open by the passing of the Australian Courts Act 1828 (Imp.).<sup>38</sup> It meant that for the first time in history jurisdictions in maritime matters exercised by the Common Law Courts and the Court of Chancery were conferred on the Supreme Courts in the Australian colonies. By section 3 of the Act the Supreme Courts of New South Wales and Van Diemen's Land were constituted "Courts of Record." They "shall have Cognizance of all Pleas, Civil...Jurisdiction in all cases whatsoever, as fully and amply, to all intents and purposes...as His Majesty's Courts or King's Bench, Common Pleas and Exchequer, at Westminster, or either of them lawfully hath in England...." Doubts as to the jurisdictional competence of colonial Supreme Court judges were also set aside. By section 3, the judges "shall have and exercise" "such and like Jurisdiction and Authority" as the judges of the Courts of King's Bench,

36. See Warrant for the Charter of Justice, Letters Patent, 2nd April 1787, H.R.A. Ser IV, vol. 1 pp. 6-12; Imperial Act 1787 (26 Geo. III, c. 2).

37. A.C. Castles, An Introduction to Australian Legal History (1971 ed.), p. 27.

38. 9 Geo. IV, c. 83.

Common Pleas, and Exchequer, in England, or any of them, lawfully have...for carrying into Effect the several Jurisdictions, Powers and Authorities committed to the said Courts respectively." The 1828 Act (Imp.) went one step further. The Supreme Courts of New South Wales and Van Diemen's Land were constituted courts of equity. They were empowered to administer justice and exercise equitable jurisdiction in the same way as the Lord High Chancellor of Great Britain.<sup>39</sup> It is submitted that the jurisdictions exercisable by the colonial Supreme Courts included not only the common law and equitable jurisdictions, but also the jurisdiction conferred by statutes on the English courts named down to the date of the Australian Courts Act 1828 (Imp.).

By way of colonial enactments, the Supreme Courts of Queensland,<sup>41</sup> Western Australia<sup>42</sup> and South Australia<sup>43</sup> were invested with similar powers. Under section 6 of the Western Australian Act 1832, the Civil Court of Western Australia was given cognizance of "all Pleas and Jurisdictions in all cases as fully and amply...as His Majesty's Courts of King's Bench, Common Pleas and Exchequer lawfully have in England." The Supreme Courts of South Australia and Queensland were conferred similar jurisdiction in 1837 and 1867, respectively. In Victoria, after it became a separate colony in 1851, the New South Wales court system was retained as an interim measure.<sup>44</sup>

39. Ibid. s. 11.

40. See the Letters of Patent constituting the Vice-Admiralty Court of New South Wales, citing various statutes on criminal offences as underlying authority for the issue: H.R.A., Ser. IV, vol. 1 (1786-1827), p. 13; Piracy Act 1850 (Imp.), 13 & 14 Vic., c 26. See generally J.M. Bennett, A History of the Supreme Court of New South Wales (1974), pp. 153-159.

41. Supreme Court Act 1867 (Qld.) (31 Vic. No. 23), ss. 21 and 22.

42. (1832) 2 Williams IV No. 1.

43. (1837) 7 Williams IV No. 5. The Supreme Court was constituted a Court of Equity in the province of South Australia and its Dependencies: s. 8.

44. A.C. Castles, An Introduction to Australian Legal History, (1971), p. 103.

The Australian Courts Act 1828 (Imp.) and the other colonial court enactments are milestones in Australian legal history. They empowered Australian courts to administer many of the principles of English maritime law. This fact is well reflected in the early reports. A large number of the cases decided by the Supreme Court of New South Wales between the passing of the 1828 Act and 1862 concerning shipping matters, e.g. wages of seamen,<sup>45</sup> collisions<sup>46</sup> and the arrest of ships.<sup>47</sup> The process of importing English maritime law into the colonies through the common law side of the court system continued,<sup>48</sup> despite the passing of the Vice-Admiralty Courts Act 1863 (Imp.).<sup>49</sup> In addition, the role of the Privy Council, as the "Final Court" in entertaining appeals against decisions of the colonial Supreme Courts, was significant. Thus under the watchful eyes of the Judicial Committee, colonial courts were duty-bound to take cognizance of a common body of maritime law principles, to administer them correctly, and to give effect to Imperial policies.<sup>50</sup>

There was another channel of reception. None of the legislation considered thus far conferred on colonial Supreme Courts any part of the jurisdiction which belonged exclusively to the High Court of Admiralty. It is true that the Vice-Admiralty Courts were established under Letters Patent to administer criminal law. The view is held that

45. Geary v. Nivian (1830) 1 Legge 1.

46. Paterson v. Knight (1849) 1 Legge 497. The issue raised was whether the master was personally liable for damage caused to another ship. For another collision case, see Spier and Another v. The Hunter River S.N. Co. (1860) 2 Legge 1351.

47. Lyons v. Elyard (1846) 1 Legge 328. The question raised was whether the arrest of a vessel by an officer of the Vice-Admiralty Court was a conversion.

48. Examples include Goldsbrough v. Melbourne Banking Co. (1867) 4 V.L.R. 105 (ship mortgage); Morse and Another v. The Australasian Steam Navigation Co. (1870) S.C.R. (N.S.W.). 7 (master's authority to sell cargo in cases of necessity); The Australasian Steam Navigation Co. v. Smith & Others (1885-86) 7 N.S.W.R. 207 (conflict of New South Wales Navigation Act 1871 with Merchant Shipping Act 1854-73 (Imp.) on the matters concerning collision); Iverson v. Rowlands (1886) 12 V.L.R. 57 (case on appeal from County Court relating to the transfer of a river barge without a registered bill of sale).

49. 26 & 27 Vic., c. 24.

50. Ibid., ss. 22 and 23.

not long after their establishment Vice-Admiralty Court judges began to assume jurisdiction in civil matters.<sup>51</sup> It is believed that this jurisdictional extension was due to the construction the Commissioners placed upon certain terms in the Letters Patent. For example, the Commissioners were, alia inter, authorised "to award execution of the offenders convicted and attainted as aforesaid according to civil law and the methods and rules of the Admiralty ....."<sup>52</sup> Support for the view is also found in the wording of part of the long title and section 4 of the Supreme Court (Admiralty) Act 1832 (Imp.).<sup>53</sup> If our reasoning is correct, it is relevant to enquire into the matters or causes over which civil jurisdiction was asumed before 1832.

The statutes of Richard II<sup>54</sup> were construed by common law judges as strictly confining the jurisdiction of the High Court of Admiralty to matters arising on the high seas - "super altum mare." The subjects of admiralty suits were reduced to torts committed at sea, e.g. collisions between ships,<sup>55</sup> salvage contracts to be performed at sea and hypothecation of ships for necessities supplied on the voyage.<sup>56</sup> Except for the last item, the Common Law Courts assumed jurisdiction over

51. D.J. Cremean, Jurisdiction in Admiralty in Australia, Ph. D. Thesis, Monash University, 1980, p. 46, footnote 1.
52. Letters Patent constituting the Vice-Admiralty Court, op. cit., p. 18.
53. 2 Williams IV, c. 51
54. 13 Richard 2 stat. 1, c.5; 15 Richard 2, c.3. In Howe v. Napier (1766) 4 Burr 1945, prohibition was issued by common law judges against the Court of Admiralty in a suit for seamen's wages. This case involved a special agreement or contract under seal.
55. The "Johern Friederick" (1839) 1 W. Rob. 36. The Court of Admiralty was held to have jurisdiction over collision between two foreign vessels on the high seas.
56. Benzen v. Jeffries 1 Raym. Ld. 153.

virtually all other matters or causes if they arose within the territorial limits of England. Subject to the prohibitions, statutory and also those imposed by common law judges, the High Court of Admiralty was competent to adjudicate upon similar matters arising on the high seas throughout the Empire. The body of principles administered had a universal character and was sometimes known as "common law of the sea." It may be presumed that, from the viewpoint of reception of maritime law into the Australian colonies, the jurisdiction of the Vice-Admiralty Courts was confined to those maritime causes within the competence of the High Court of Admiralty.

#### IV. STATUTE LAW PRIOR TO 1828

A distinction was drawn between unenacted law and statute law. It was in the nature of the rules of common law to transfer virtually the bulk of unenacted law to the colonies. But with regard to statute law, the reception mechanism was selective and subject to many restraints.

In the year 1724, a crucial question was raised as to what English laws were in force in Jamaica as a settled colony. Sir Phillip Yorke and Sir Clement Weary replied:<sup>57</sup>

"Such Acts of Parliament as have been made in England to bind the Plantation in general or Jamaica in particular and also such parts of the...statute law of England as have by long usage and general acceptance been received and acted under there...are to be considered in force."

In the celebrated case of Campbell v. Hall,<sup>58</sup> Lord Mansfield endorsed the above view as a "maxim of constitutional law." According to Burton, J., for any pre-1788 statutes to be applicable they should be suitable to the condition of the colony.<sup>59</sup> Other criteria were formulated. Was the Act "a law of local policy adapted solely to the country in which it was made?" Was it "founded on reasons which were peculiar to England in their application, and which had no reference to the conditions of an infant settlement?"<sup>60</sup>

57. For citation, see Macdonald v. Levy (1833) 1 Legge 38, p. 53.

58. Lofft 650, Cowp. 204.

59. Macdonald v. Levy (1833) 1 Legge 38, p. 52.

60. State Government Insurance Commission v. Trigell and Others (1978) 142 C.L.R. 617, p. 626, per Gibbs, J.

Section 24 of the Australian Courts Act 1828<sup>61</sup> reads:

"...all laws and statutes in force within the realm of England at the time of passing of this Act...shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively...."

The section has been regarded as "merely declaratory of what the law was before, which directs that so much of the statute and common law shall be as can be applied."<sup>62</sup> By section 24, the Imperial Parliament had cast upon colonial judges the initial duty of determining the applicability of English statutes to the colonies.<sup>63</sup>

The factors closely linked with the British plans for overseas trade and settlements prior to 1828 must be analysed. They often provided valuable background information for judges to decide whether a given merchant shipping Act would apply in the colonies.

In a number of ways, Britain's expansion programme, primarily through the building up of a large merchant fleet, had been retarded. The major obstacles were the heavy financial strains placed on British shipowners both in England and the colonies. It also meant that British ships might not be able to compete on par with foreign ships. By an early rule of common law, applicable throughout the Empire, owners of ships operating as common carriers were treated as insurers of the goods carried.<sup>64</sup> The result was that for any loss or damage sustained by such goods during transit the shipowners would be fully answerable. The only exceptions which availed shipowners were the act of God,

61. 9 Geo. IV, c. 83, also known as the Huskisson Act (Imp.)

62. Rex v. Farrell, Dingle and Woodward (1831) 1 Legge 5, p. 10, per the Chief Justice.

63. Ex parte Lyons - In re Wilson (1839) 1 Legge 140, p. 142, per the Chief Justice.

64. The liability can be traced to the early eighteenth century where in Coggs v. Bernard (1703) 2 Raym. 909 Holt, C.J. justified it on the grounds of policy. It was to prevent the carrier from conspiring with thieves to plunder goods placed under his care.



inherent vice in the goods and the King's enemies.

Accordingly between the years of 1734 and 1813, several Imperial Acts were passed to give a new boost to British merchant shipping. These Acts may be construed as applicable to the colonies because they were of general application, indicating the necessary intendment of the British Parliament for the purpose. A consequent development was the passing of the Australian Courts Act 1828 (Imp.)<sup>65</sup> The Supreme Courts thus established were constituted courts of equity. It is submitted that they were competent to adjudicate upon claims and to grant reliefs and limited-liability benefits under the Imperial Acts of 1786 and 1813.<sup>66</sup>

An early setback suffered by the British merchant fleet was the crippling cargo losses. They were believed to have been caused by embezzlement committed by ships' masters and crews, though often in necessitous circumstances. The Imperial Parliament intervened to protect shipowners as they had no effective control over the conduct of their employees at sea. Where, without the privity and knowledge of shipowners, loss or damage was caused to goods carried on board, including valuables, the statute of George II<sup>67</sup> provided important relief. The liability of shipowners was limited to the value of the carrying vessel, together with her appurtenances, and the full amount of the freight earned during the voyage.<sup>68</sup>

65. In Quan Yik v. Hinds (1905) 2 C.L.R. 345, the High Court of Australia found a particular provision of the statute 4 Geo. IV, c. 60 inapplicable to New South Wales. The reason was that the machinery necessary for the enforcement was unavailable.

66. For provisions empowering "any Court of Equity" to hear and adjudicate upon such matters, see (1786) 26 Geo. III, c. 86, s. 4; (1813) 53 Geo. III, c. 159, s. 7.

67. (1734) 7 Geo., II c. 15.

68. Ibid., s. 1.

Further measures were introduced to stimulate the growth of merchant shipping. They were designed to curtail the rights of cargo owners. As an epoch-making event, the statute of George III<sup>69</sup> conferred wide immunities on shipowners and, in some cases, masters. The above statutory limitation of liability was extended to cover cargo loss or damage, though not caused by the embezzlement or privity of the master or crew members.<sup>70</sup> For loss or damage caused to goods by fire on board, shipowners were fully relieved from liability.<sup>71</sup> Moreover where valuables, e.g. diamonds, were lost or damaged due to embezzlement, robbery, etc., shipowners and masters were generally not liable.<sup>72</sup> The exception to the rule was where, at the time of shipment, the true nature, quality and value of such valuables had been inserted in the bill of lading or declared to the master or shipowner. The absence of the "fault or privity" element on the shipowners' part remained the basis for limiting liability for cargo or damage. Another statute of George III<sup>73</sup> extended the relief. The maximum liability of shipowners was confined to the value of the carrying vessel plus the freight due or to be earned for the voyage.

A useful rule relating to the applicability of statutes may be inferred. Once an Imperial Act is adjudged to extend to the colonies, unless otherwise provided, subsequent enactments on the subject would be similarly construed.

Moreover, because of the necessary intendment and the general nature of the provisions, parts of a number of statutes would be construed as applicable to the colonies. The overall strategy to strengthen the merchant fleet as an Empire-spanning measure underlay much of British shipping legislation. Britain regarded Empire shipping as her

69. 26 Geo. III, c. 86.

70. Ibid., s. 1.

71. Ibid., s. 2.

72. Ibid., s. 3.

73. 53 Geo. III, c. 159, s. 1. Value of freight defined in s. 2.

legislative monopoly. Thus every Imperial statute or parts thereof, which served to further or promote the Empire-building doctrine, would fall within this category. For the purpose of the reception, there was a difference between merchant shipping legislation and other statutes.

It is evident that one aspect of the doctrine is to achieve certain predetermined goals for the benefit of Britain and her colonies. For example, a statute of George III prohibited British ships being built or repaired in foreign ports.<sup>74</sup> It sought to promote shipbuilding and ship-repairing in the colonies. Its object combined with the overseas element would make it binding on colonial courts to impose the penalties against British ships for contravening its provisions.<sup>75</sup>

Section 2 of the statute of George II<sup>76</sup> introduced an important incentive for colonial and foreign investors to advance money under the Act on the hypothecation of British ships. Its thrusts were two-pronged. Firstly, it promoted the value of British ships as universal mortgage security. Secondly, it provided protection for the holder of a bottomry or respondentia bond, including the beneficiary of an insurance policy taken out by such holder. Under the statute, he was entitled to prove his claim in the bankruptcy of the debtor-obligor. He would be able to recover from the bankrupt's estate part of the debt as if the loss or contingency had occurred before the bankruptcy.

The impact of Imperial policy on colonial and intercolonial shipping soon characterized much of British legislation. In marked contrast to the earlier approach, the necessary intendment of the British Legislature became more pronounced in a number of ways. For example, the preamble to a statute of George IV reads:<sup>77</sup>

74. (1786) 26 Geo. III, c. 60, s. 20.

75. *Ibid.*, s. 32. For non-compliance with registration procedure, British ships would be prevented from leaving port and enjoying the privileges. Moreover, a ship leaving port without the registry certificate would be forfeited.

76. (1746) 19 Geo. II, c. 32.

77. (1823) 4 Geo. IV, c. 41.

"Whereas the Wealth and strength of this Kingdom and the Prosperity and safety of every part of the British Empire greatly depended on the Encouragement given to Shipping and Navigation ...."

This entitlement to the privileges of British ships was closely linked to ship registration.<sup>78</sup> Consequently, the provisions dealing with such matters would be applicable in the colonies whenever the status of ships trading there was raised.<sup>79</sup> Colonial authorities were bound to detain, or enforce the forfeiture against, ships in accordance with the provisions of the Act.

The Supreme Courts were empowered by the Australian Courts Act 1828 (Imp.) to "adjudge and decide" as to what Imperial legislation was applicable to the colonies. Their task was simplified by the use in the Acts of the words "British Empire," signifying the intendment of the British Legislature. For example, a statute of George IV<sup>80</sup> stated, inter alia, "this Act shall come into and be and continue in full force and operation, and shall constitute and be the law of navigation of the British Empire."<sup>81</sup> Statutory encouragements to British shipping and navigation throughout the Empire were maintained. Transport of goods between British possessions, including the colonies, was limited to British ships which had to be duly registered. The provisions extended to procedures for ship transfers and ship mortgages as security. In the light of the fast-growing boat-building industry

78. Ibid., s. 2. As from 31st December, 1823, registration was required for all ships having decks, or for ships of the burthen of 15 tons and above. Otherwise they would not be entitled to the privileges or advantages of British ships.

79. Ibid., s. 4 ships would be forfeited for contravening certain provisions.

80. (1825) 6 Geo. IV, c. 109.

81. Ibid., s. 1.

in New South Wales established prior to 1797, section 13 of the Act was of special significance. Although not registered, all British-built boats or vessels under fifteen tons, wholly-owned and navigated by British subjects, were recognized as British vessels for certain purposes. They could be used for navigating the rivers and the coasts of the United Kingdom or the British possessions within the limits prescribed.

#### V. STATUTE LAW AFTER 1828

Consideration is now given to an important development in admiralty law in the Australian colonies. In 1825, when Van Diemen's Land became a separate colony, another Vice-Admiralty Court was established.<sup>83</sup> Indeed, such courts had become a feature of many British colonies.<sup>84</sup> Apparently, the civil jurisdiction exercisable by the colonial Supreme Courts and the Vice-Admiralty Courts over maritime causes was grossly inadequate. This setback would hinder the expansion of maritime activities in the Empire in the early part of the nineteenth century, and also Britain's plan to transfer her laws to the colonies.

The answer to the problem came when the British Parliament enacted the Supreme Court (Admiralty) Act 1832 (Imp.). It was the first of a series of Imperial Acts which had the object of constituting the Vice-Admiralty Courts to administer the laws according to the practice and rules of the High Court of Admiralty. It empowered Vice-Admiralty Courts in His Majesty's possessions abroad to adjudicate upon "suits for seamen's wages, pilotage, buttomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty's service at sea, salvage and droits of Admiralty."<sup>85</sup> The Vice-Admiralty Courts were given jurisdiction over

82. H.R.A. Ser. I, vol. II, op. cit., p. 203.

83. See Warrant for Commission of Vice-Admiralty Court in Van Diemen's Land, 1st September, 1825, H.R.A. Ser III, vol. IV, p. 598.

84. For correspondence addressed to Governors of colonies where Vice-Admiralty Courts had been established, see H.R.A. Ser I, vol. II, op. cit., p. 376.

85. (1832) 2 Williams IV, c. 5, s. 6.

suits arising both within and out of the local territorial limits.<sup>86</sup> By summary application to the High Court of Admiralty, an appeal could be taken thereto by any person who was aggrieved by the charges or costs imposed by a Vice-Admiralty Court.<sup>87</sup> The Act ushered in a new phase of admiralty jurisprudence for the colonies. It marked the post-1828 reception of the High Court of Admiralty procedure, the remaining aspects of the law not previously imported, and also whatever new principles developed by that Court down to the date of the 1832 Act.

Among the shipping legislation listed in the Victorian Imperial Acts Application Act<sup>88</sup> is a statute dating back to 1705.<sup>89</sup> Sections 17, 18 and 19 relating to actions and the limitation period for the recovery of seamen's wages were received as part of Victorian law. The six-year limitation period applied to all suits and actions for seamen's wages in the "Court of Admiralty." Distinction existed between two types of seamen's employment contracts. By the issue of prohibitions, common law judges had prevented the High Court of Admiralty from hearing wage claims based on agreements executed under seal. It is logical to infer that the common law jurisdiction which colonial Supreme Courts had derived under the Australian Courts Act 1828 (Imp.) and the colonial court legislation would empower them to entertain such claims. But until the Supreme Court (Admiralty) Act 1832 (Imp.) was passed, it was doubtful whether causes based on sections 17 to 19 of the 1705 Act (Imp.) could be heard anywhere other than the High Court of Admiralty.

The Victorian case of Wallace v. Hitchins<sup>90</sup> is of special relevance. It concerns the reception and application of sections of the 1845 Act (Imp.)<sup>91</sup> dealing with ship registration. Under a bill of sale, B bought the schooner "The Margaret", then lying in the Port of

86. Ibid., s.6.

87. Ibid., s.5.

88. 13 Geo. V No. 3290.

89. See Second Schedule to (1705) 4 & 5 Anne, c.3.

90. A Beckett's Reserved Judgment Williams Practice Cases (1846-51), p. 52.

91. (1845) 8 & 9 Vic., c 89; commonly known as the "Registry Act."

Melbourne. On 18th July, 1850, by deed B and his partner, H, jointly assigned their assets including the schooner, to S and C to hold on trust for the creditors of B and H. On 9th November, 1850, the schooner was accordingly registered in B's name. On 5th December, 1850, the plaintiff obtained judgment against B, resulting in the ship's transfer to the former by a bill of sale executed by the sheriff on 16th December. The transfer was registered on 21st March, 1851. S and C had sold and transferred the ship to the defendant on 4th December, 1850. The judgment plaintiff purchased the ship with knowledge of the sale. On 1st April, 1851, S and C by another deed conveyed the ship to the defendant. Both the ship and the certificate of registry were in the defendant's possession. The court resolved the conflicting claims by applying the provisions of the Imperial statute. By section 37 of the 1845 Act (Imp.), no bill of sale or other instrument could effectively pass the property of any ship or share therein for any purpose until the statutory requirements were satisfied. The bill of sale or other instrument had to be produced to the Collector and Controller of the port where the ship was registered. Her particulars had to be entered by the Collector and Controller in writing in the book of registry. The court gave effect to section 37 by holding that the title to the schooner was complete not from the date of the bill of sale but from the date of registration. B's title was complete on 9th November, 1850, after the transfer was registered as required by section 37. The plaintiff's title became complete under the bill of sale from the sheriff, followed by the registration. Judgment was given for the plaintiff.

In this case, Imperial legislation was administered by the court as part of the law of Victoria and was not applied in a conflict of laws situation. Its paramountcy showed the intention of the British Parliament to regulate, throughout the Empire, all dealings affecting British ships. It foreshadowed Britain's plan to formulate to a merchant shipping code for the Empire.

A landmark in Australia's legal history came when the Merchant Shipping Act 1854 (Imp.)<sup>92</sup> was passed. With the exception of four

92. 17 & 18 Vic., c. 104.

93. Parts, most of the seven Parts were expressed to extend to Her Majesty's Dominions,<sup>94</sup> whilst certain provisions were applicable solely to the colonies. The Act consolidated, in a revised form, the well-tried provisions drawn from a number of previous enactments. Its object was to implement, as an Imperial policy, in Her Majesty's Dominions a five-fold plan. The five areas covered may be identified as (i) the Empire-wide regulation of British ships; (ii) the encouragement of shipping and seamen; (iii) the protection of mariners; (iv) the promotion of safety at sea and prevention of collision; and (v) the expansion of British maritime trade and commerce.

The effect of the Colonial Laws Validity Act 1865 (Imp.)<sup>95</sup> on the situation merits consideration. In no way did the new powers given to colonial legislatures change the pattern of maritime law already set for the Australian and other colonies. Under the 1865 Act, English laws received into the colonies are placed within two categories. Included in the first category were unenacted and statute laws. They were imported on account of their applicability according to the circumstances and conditions prevailing in the colony in 1788 or at the time when the Australian Courts Act 1828 (Imp.) became law. The Colonial Laws Validity Act 1865 (Imp.) is seen as a law reform instrument in that it empowers colonial legislatures to review, amend or repeal such laws received.<sup>96</sup> Section 1 creates a special category of

93. They were (a) Part I: Board of Trade and its functions;  
(b) Part VI: Pilotage (only applicable to the United Kingdom);  
(c) Part VI: Lighthouses (only applicable to the United Kingdom);  
and (d) Part VII: Mercantile Marine Fund (not applicable to colonies generally).

94. See below.

95. 28 & 29 Vic., c. 63.

96. Ibid., s. 3



"paramount laws." It includes all Imperial legislation which applied or continues to apply to colonies by reason of "the express words or necessary intendment." Most of the statutes considered belong to this category.<sup>97</sup> They combined to lay down an infrastructure within which colonial legislatures and maritime law in the colonies were to operate.

As will be seen later, the Merchant Shipping Act 1854 (Imp.) provided for the registration of ships and ship mortgages and a wide range of other matters relating to merchant shipping in the colonies.<sup>98</sup> The Merchant Shipping Act 1894 (Imp.) consolidated the law and extended to the colonies by "paramount force" a larger body of statutory principles than its predecessor.<sup>99</sup> It is the capstone representing two centuries of Empire-building efforts. Besides building upon the foundations laid, it strengthened the position of the Imperial Parliament as the ultimate authority to determine the form and substance of maritime law in the Empire. It is interesting to note that Imperial legislation which applied to the colonies did not stop at the passing of the 1894 Act (Imp.). There were at least three Acts enacted after

97. *Ibid.*, ss. 1 and 2. Colonial laws which are repugnant to such Imperial Acts are rendered null and void to the extent of their repugnancy.

98. As to the major areas of the law covered by Imperial legislation, see e.g. Part II on ownership and registration of ships extending to the whole of Her Majesty's Dominions, s. 17; Part III on masters and seamen applicable only in certain aspects, s. 109; Part IV on safety and prevention of accidents applicable to all British and certain foreign ships, s. 291; Part VIII on wrecks, casualties and salvage applicable only in limited aspects, ss. 486 *et seq.*; Part IX on liability of shipowners, s. 502, and Part X on legal procedure, s. 517, extending to the whole of Her Majesty's Dominions; and s. 547.

99. 57 & 58 Vic., c. 60. Examples of provisions which applied to the colonies include the following: Part I on registration of ships and ship mortgages, *etc.*; Part II on masters and seamen; Part VIII on liability of shipowners; Part XIII on legal proceedings; ss. 735 and 736. It is almost double the length of the 1854 Act.

it, the last in the series being the Merchant Shipping Act 1906 (Imp.).<sup>1</sup>

Mainly substantive principles of statutory law were imported into the colonies through the operation of Imperial legislation. However, between the years 1863 and 1890,<sup>2</sup> a number of Imperial Acts were passed to restructure the courts, viz. the Vice-Admiralty Courts and later the Colonial Courts of Admiralty for administering English maritime law in the colonies. Undoubtedly, through the work of these specialised tribunals, the substantive principles of case law and the practice and rules of the High Court of Admiralty came to be woven into the fabric of the Australian legal systems.

## VI. CONCLUSION

We have considered the three main channels of reception of English maritime law into the Australian colonies. They were the paramount legislation, the courts exercising common law and equitable jurisdiction and the Vice-Admiralty Courts, later superseded by the Colonial Courts of Admiralty. Merchant shipping in the Empire was a subject that the Imperial Parliament had reserved for itself to the virtual exclusion of colonial legislatures. Cognizance of this fact is found in the unanimous judgment in The Australian Banking Co. v. Burns<sup>3</sup> delivered by the Supreme Court of New South Wales, sitting in banc. It was pointed out that by section 10 of the Vice-Admiralty Courts Act 1863 (Imp.) claims in respect of eleven different matters could be brought in Vice-Admiralty. The Chief Justice is reported to have said:<sup>4</sup>

"The jurisdiction of the Vice-Admiralty Court having been determined by the Imperial Parliament, cannot be extended by the Navigation Law Amendment Act (NSW) (45 Vic. No. 6). Therefore if this Act of Parliament does...attempt to give jurisdiction to the Judge Commissary in other than the matters specially mentioned...then the Act of Parliament is ultra vires."

1. 6 Edw. 7, c. 48. By s. 71, the word "owner" in the 1894 Act, ss. 502-509, was amended to include a demise charterer; see McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd. (1945) 70 C.L.R. 175, pp. 213 and 215, per Dixon, J. The provisions relating to the limitation of shipowner's liability in the Merchant Shipping Act 1906, ss. 70 and 71, and in the other two Acts, viz. Merchant Shipping (Liability of Shipowners) Act 1898, s. 1 as amended, and Merchant Shipping (Liability of Shipowners and others) Act 1900, ss. 1, 3 and 4, applied to the whole of Her Majesty's Dominions.
2. Vice-Admiralty Courts Act 1863 (26 & 27 Vic., c. 24); Vice-Admiralty Courts Act Amendment Act 1867 (30 & 31 Vic., c. 45); Colonial Courts of Admiralty Act 1890 (53 & 54 Vic., c. 27).
3. (1889) 9 W.N. (N.S.W.) 19.
4. Ibid., p. 20.

## CHAPTER TWO

### INVOLVEMENT OF MARITIME LAW IN THE COLONIES AND STATES

#### I. INTRODUCTION

Our object here is to evaluate the work of Australian colonial legislatures in building up the body of maritime law. Essentially, the Imperial legislation, which established the colonial legislative councils, empowered them to make laws for the peace, welfare and good government of the colonies.<sup>1</sup> The laws and ordinances passed were subject to one overriding condition. They were not to be repugnant to the Imperial laws, e.g. orders in council, charters, letters patent and statutes, which applied whether directly or indirectly to the colonies.<sup>2</sup> In the context of the powers given and the responsibilities thrust upon them, the colonial legislators had to come to grips with the problems facing them. It is intended to ascertain how far, within the terms of the legislative powers given, the legislatures in the Australian colonies enacted laws which corresponded to English laws. Our examination is confined to two areas of colonial contribution.

The pace and nature of progress in each of the colonies were often affected by local circumstances, economic conditions and political factors. It is therefore necessary to focus attention on the situation of each colony separately. The work traces the evolvement of the rights and protection of seamen from the early days of colonial settlement through to the present time. That this legislation has stood out as the foundation of colonial or "home-grown" seafaring industry is beyond dispute. The other significant contribution to the growth

1. R.D. Lumb, The Constitutions of the Australian States (4th ed. 1976), pp. 10, 12, (for New South Wales); p. 26 (for Victoria); p. 30 (for South Australia); p. 34 (for Tasmania); p. 35 (for Queensland); p. 38 (for Western Australia).
2. See e.g. the New South Wales Act 1823 (Imp.) (4 Geo. IV, c. 96), ss. 4 and 9; the Colonial Laws Validity Act 1865 (Imp.) (28 & 29 Vic., c. 63), s. 2. See generally Professor Enid Campbell, "Colonial Legislation and the Laws of England" (1964-67) 2 Univ. of Tas. L. Rev. 148.

of colonial and intercolonial maritime trade was colonial legislation passed to promote the safety of life at sea and prevent collision at sea. An examination is made of the interaction between, and the comparative aspects of, the laws of the six colonies in these two areas.

It is interesting to consider how far colonial legislators had, by legislation, extended Imperial laws to apply to their territories. This process could constitute another law reception mechanism.

## II. SEAMEN

### 1. New South Wales

The territory of New South Wales under the governance of Captain Phillip comprised the whole of eastern Australia, including Tasmania.<sup>3</sup>

An initial concern of the colonial legislators was to ensure the steady flow of shipping trade and its wealth into the colony. Effective control had to be maintained over the increasingly large numbers of mariners and ships coming to Port Jackson and other ports.<sup>4</sup> The circumstances and conditions of colonial ports and harbours were vastly different from those of English ports and harbours. Consequently, English port authority laws, which were mainly statutory and largely specific, and port customs would not be applicable in the colony.<sup>5</sup> Moreover, early colonial legislation had to satisfy an important criterion. It had to be in line with the Imperial policy of enlarging the British merchant fleet.<sup>6</sup>

Thus legislation in the colony was passed to direct the proper performance and discharge of seamen's duties. Ships' masters were required to issue certificates to their seamen on discharge,<sup>7</sup> and were

3. Windeyer, Legal History (2nd ed. 1957), p. 297.

4. For the regulation and control of seamen within the colony of New South Wales and its Dependencies, and for the establishment of a police force, see early New South Wales enactments, e.g. (1840) 4 Vic. No. 17; (1849) 13 Vic. No. 30.

5. In England, the port authorities were administered as corporations established by Acts of Parliament, which had no application to other ports, whether local or overseas.

6. See Chapter One.

7. 4 Vic. No. 17, s. 14.

forbidden to engage any seamen not in possession of such certificates.<sup>8</sup> Colonial courts were empowered to impose penalties on seamen for acting in breach of the law.<sup>9</sup> These measures instilled discipline into seafaring as a growing industry. A further boost to the process was the establishment of a permanent official record of all seamen at each colonial port. This was achieved by extending<sup>10</sup> certain provisions of an Imperial Act.<sup>11</sup> They required, inter alia, the keeping and maintaining of "a Register of all the men engaged in that service."

The vulnerable position of seamen and the pressures brought to bear on them led to legislative intervention to alleviate their problems. The 1847 Act (N.S.W.)<sup>12</sup> made it an offence for any person to demand or receive payment from any seaman "on account of the hiring, supplying or providing any such seaman." No payment of wages made to a seaman in contravention of the provisions was valid.<sup>13</sup> Shipowners and masters, however, had little difficulty in circumventing the law. Before the articles were signed, seamen were often subjected to pressure from their employers to execute documents relinquishing their rights to wages and salvage rewards. Another device for exploiting seamen was the pre-arranged disposition of their wages in favour of some third party. The 1849 Act (N.S.W.)<sup>14</sup> was passed to render null and void all such agreements. Despite "prior disposition made by bill of sale or assignment or any attachment or encumbrance made thereon," "every payment of wages to a seaman" was "effectual in law."<sup>15</sup> Further protection was conferred on seamen. Before any seaman was carried to sea in a British ship or a New South Wales registered ship of the burden of eighty tons or more, a written agreement containing all the required particulars had to be signed.<sup>16</sup>

8. Ibid., ss. 8 and 16.

9. E.g. fines were imposed on any seamen found on shore after 9.00 p.m. without a pass: (1843) 7 Vic. No. 21, (N.S.W.), ss. 2 and 10.

10. Sea Act (1843) 7 Vic. No. 22 (N.S.W.), s. 17.

11. 5 & 6 Wm. IV, c. 19.

12. 11 Vic. No. 23, s. 8.

13. Ibid., s. 7.

14. 13 Vic. No. 28.

15. Ibid., s. 12. It prevented unlawful deprivation of a seaman's wages. Moreover, wages of less than £20 could be recovered summarily before a Justice of the Peace: ibid., s. 15.

16. Ibid., s. 2.

There was one difficulty in giving effect to the 1849 Act. As most of the seamen were illiterate, Shipping Masters were appointed at Sydney and other ports to authorise the engagement and discharge of seamen, and witness the execution of the ship's articles.<sup>17</sup>

Hardships to seamen were often occasioned by the insolvency of shipowners as employers. The ship and tackle would be arrested by the creditors in satisfaction of their claims. It meant that seamen would be unjustly deprived of their wages. To remedy the situation, colonial legislation intervened by providing that a seaman's right to wages could be enforced by a "lien upon the ship," i.e. by a claim of proprietary nature.<sup>18</sup> Similar protection was extended to the wages of the ship's master.<sup>19</sup> The Seamen's Laws Consolidation Act 1864 (N.S.W.) struck down any agreement which deprived seamen of their lien and remedy for the recovery of their wages. Before long, seafaring in the colony became a family-supporting career. Seamen's family members or relatives in whose favour allotment notes were made out could summarily sue for and recover the amounts payable.<sup>20</sup> When a seaman died at sea, the master was duty-bound to take custody of the deceased's effects and hand them over, including any wages due, to the Shipping Master at the port of destination.<sup>21</sup>

The Seamen Act 1898,<sup>22</sup> currently in force in New South Wales, is largely a consolidating statute. The omission in section 4 of a provision similar to section 90 (4)<sup>23</sup> of the 1864 Act makes the position

17. Act (1853) (17 Vic. No. 36) (N.S.W.), ss. 4, 9 and 7.

18. This right had long been recognised at common law in The "Neptune" (1824) 1 Hag. Adm. 225, supra. Reference to this right is made in (1849) 13 Vic. No. 28, s. 19. For further protection of seamen's wages, see (1853), 17 Vic. No. 36, ss. 7 and 10 and Chapter Seven.

19. Ibid., s. 19. In Earp v. Barque Conference 10 W.N. 85, it was held that a ship's master was the only person who could sue for disbursements under the Act 26 Vic. No. 24 (N.S.W.), s. 10 (2).

20. (1864) 27 Vic. No. 13, s. 29.

21. Ibid., ss. 51 and 52. As to wages and personal effects of seamen dying in the colony, see s. 54. For recovery of wages when seamen were lost with the ship, see s. 60.

22. Act No. 46 of 1898.

23. By this sub-section, certain provisions of the Act were expressed to apply to foreign ships including their owners, masters and crews when such ships were within the colony.

unclear. One suggestion is that the 1898 Act is not intended to apply to foreign ships which are within the territorial waters of New South Wales.<sup>24</sup>

## 2. Tasmania

The creation of Tasmania as a separate colony in 1825 meant that she had to map out her strategy in dealing with the problems of seamen. In her innovative efforts to align herself with Britain's Empire-building programme, Tasmania showed initiative in establishing a legal framework to regulate and promote seafaring in the colony. In England, the law relating to merchant seamen, which had passed into colonial jurisprudence, was amended and consolidated by a statute of William IV enacted in 1835.<sup>25</sup> To avert any disunity which would otherwise result, the Tasmanian Legislative Council on 29th July, 1837, passed its first shipping legislation.<sup>26</sup> It extended to Tasmania the provisions of the Imperial Act. Consistent with the underlying British doctrine, important provisions were enacted to safeguard the interests of seamen and their rights to wages.<sup>27</sup> This factor characterised most of Tasmanian shipping objectives.

Certain gaps appeared in the law. Crews of Tasmanian-registered ships were often engaged in the United Kingdom and elsewhere under agreements subject to the Mercantile Marine Act 1850 (Imp.)<sup>28</sup> but not in the form prescribed by the law here. Somehow for certain offences, e.g. desertion, the seamen involved were not punishable because the prerequisites as to form were not met. The difficulty was removed in 1852<sup>29</sup> by importing the provisions of the Imperial Act.

24. S. 4 defines its scope. It applies to all persons in New South Wales including the owners, masters and crews registered in or belonging to New South Wales, the United Kingdom and any of Her Majesty's Dominions. For provisos, see ss. 4 (1) and 5.

25. (1835) 5 & 6 W. IV, c. 19; see its long title.

26. (1837) 8 Wm. IV No. 10 (Tas.).

27. *Ibid.* s. 3. No seamen could be deprived of any existing remedies for the recovery of their wages, e.g. their lien upon the ship; and no agreement contrary to this Act would be valid: s. 7. By the Foreign Seamen Amendment Act 1870 (34 Vic. No. 22) (Tas.), s. 1, no debt in excess of five shillings could be recovered after he had agreed to serve, until the service was concluded.

28. 13 & 14 Vic., c. 93, s. 121.

29. (1852) 16 Vic. No. 14 (Tas.).

The Seamen Act 1859<sup>30</sup> was the first to introduce into Tasmanian seafaring a number of new aspects. These related, *inter alia*, to apprenticeship to the sea service,<sup>31</sup> the employment of seamen,<sup>32</sup> the allotment of wages<sup>33</sup> and the protection of their rights and interests.<sup>34</sup> Tasmanian legislators, no doubt, took cognizance of the developments in English law. In Chapter One, we have seen how a group of case authorities had invested seamen's rights to their wages with a unique character. The judicial principles laid down must have strongly influenced legislators' consideration as to the content of the Act. Obviously another weighty factor was the passing of the Imperial Merchant Shipping Act 1854 as a consolidating measure. These reasons explain the similarity, in terms of substantive principles, between the Seamen Act 1859 and English law.

Four decades later, the provisions on merchant seamen in Part II of the Imperial Merchant Shipping Act 1894<sup>35</sup> set the pattern for colonial legislation. Tasmania adhered to the policy by conferring on her seamen the same status and protection as those of their English counterparts. This goal was achieved by the passing of the Merchant Seamen Act, 1935 (Tas.)<sup>36</sup> which currently remains in force. It has operated as a reception mechanism. The provisions of Part II of the 1894 Act (Imp.), as modified, are extended to "all British ships registered at, trading with, or being in any port in the State [Tasmania] and to the owners,

30. (1859) 23 Vic. No. 7 (Tas.) Strict discipline was imposed for desertion. In Cox v. Lo Fook, Lo Lock and Ho Poo (1909) Tas. L.R. 53, the defendant seamen were charged with desertion under s. 92. Although their written agreements had expired before reaching New Zealand, the court held that the defendants had come from New Zealand to Tasmania under some kind of verbal agreement with the master. They were, therefore, convicted of desertion under s. 92.

31. Ibid., ss. 13-19, similar to Merchant Shipping Act 1854 (Imp.), ss. 141, 143 and 145.

32. Ibid., ss. 20-33; see also 1854 Act (Imp.), ss. 147, 149, 150, 156-158 and 161-167.

33. Ibid., ss. 34-35; see also 1854 Act (Imp.), ss. 170-175.

34. Ibid., ss. 36-41. The word "lay" was defined in s. 1 to mean "remuneration by a share in the proceeds or profits of the adventure"; 1854 Act (Imp.), ss. 170-175; see also ibid. ss. 42-48. As to wages, lays and effects of deceased seamen, see ibid., ss. 56-66.

35. 57 & 58 Vic., c. 60.

36. 26 Geo. V No. 93.



masters and crews thereof."<sup>37</sup> Whatever doubts one has about Tasmanian legislative thinking are removed by the rider in section 4 of the 1935 Act. The Governor is empowered to appoint mercantile and other officers to perform the same duties as their English counterparts under the Imperial Act.<sup>38</sup>

### 3. Victoria

For over a decade after Victoria became a separate colony in 1851, the importance of her ports and harbours as the centres of maritime commerce and trade was highlighted by the early legislation.<sup>39</sup> The first Victorian Act of 1853<sup>40</sup> on shipping reflects a thrust on two fronts. Firstly, it served to raise the level of professional conduct among seamen in the colony. The overriding objective was implemented by the creation of a number of arrestable offences, including desertion, insubordination and refusal to work.<sup>41</sup> Secondly, for the maintenance of law and order, the colonial courts assumed an increasingly important role. The problems created by the presence in the colony of large numbers of foreign seamen were resolved by an Act passed in 1854.<sup>42</sup>

Victoria, too, contributed her share towards Empire-building. Her efforts in promoting the "British seamen" concept was seen in the enactment of the Seamen Statute 1865 (Vic.).<sup>43</sup> Its historical importance lay in the substantial adoption of Part III of the Imperial Merchant

37. *Ibid.* s. 3. The 1894 Act (Imp.), s. 264, reads: "If the legislature of a British possession, by any law, apply or adapt to any British ships registered at, trading with, or being at, any port in that possession, and to the owners, masters, and crews of those ships, any provisions of this Part of this Act which do not otherwise so apply, such law shall have effect...as if it were enacted in this Act." Tasmania is a British possession within the meaning of this section. See also the Imperial Interpretation Act 1889 (52 & 53 Vic., c. 63), s. 18 (2) and McArthur v. Williams (1936) 55 C.L.R. 324.

38. *Ibid.*, s. 4 (2). Also the Governor is empowered to make regulations for the purposes of the 1935 Act (Tas.).

39. At the time of separation, the New South Wales legislation in force applied as part of Victorian law.

40. 16 Vic. No. 33, which repealed two New South Wales Acts, (1840), 4 Vic. No. 17 and (1843), 7 Vic. No. 21.

41. *Ibid.*, ss. 4 and 5.

42. Foreign Seaman's Act 1854 (18 Vic. No. 6). After conviction foreign seamen could be imprisoned with hard labour: s. 2 (1)-(6).

43. This Act (28 Vic. No. 245) consolidated the law relating to seamen.

Shipping Act 1854. By section 3 of the Victorian Act, Part III of the Imperial Act was modified for application to "all British ships registered at, trading with and being at any place within...Victoria and to the owners, masters, mates and crews thereof...." The continuing parity of Victorian seamen with their English counterparts was maintained by an ingenious device. Section 4 of the 1865 imported into Victoria not only the changes made by the Merchant Shipping Amendment Act 1862 (Imp.),<sup>44</sup> but also the provisions of future Imperial Acts repealing or amending Part III of the 1854 Act (Imp.).

The Seamen Statute 1865 dealt, *inter alia*, with the misconduct of foreign seamen and the abuse of the Vice-Admiralty Court process.<sup>45</sup> However, its adoption of the provisions of Part III of the Imperial Merchant Shipping Act 1854 relating to masters and seamen was not totally satisfactory. The conditions and circumstances prevailing in the colony rendered certain provisions of the 1854 Act (Imp.) unsuitable. Moreover, due to the progress achieved some twenty-five years later, the 1865 statute proved inadequate.

Accordingly, the Seamen's Act 1890 (Vic.)<sup>46</sup> was passed. It repealed and virtually re-enacted all the provisions of its predecessor with the exception of Part I on "Adoption of Imperial Act." With minor exceptions, similar adoption provisions were included in section 230 of the Marine Act 1890 (Vic.).<sup>47</sup> A number of important amendments were made. Sections 241 and 242 of the Act (Imp.) were not adopted as part of Victorian law. The expressions "Board of Trade" and "United

44. 25 & 26 Vic., c. 63, ss. 13-24.

45. E.g. unlawful arrest of a vessel or master would render the complainant and proctor liable for costs and damages: Seamen Statute 1865, ss. 17 and 18.

46. (1890) 54 Vic. No. 1139.

47. 54 Vic. No. 1165. Though reserved on 10th July, 1890, this Act did not receive the Royal Assent until 10th December, 1890. Apparently, between 10th July and 10th December, when a lacuna existed in the law, those matters relating to masters and seamen were governed by common law, as the Marine Act 1890 (Vic.) did not operate with retrospective effect.

Kingdom" were to be read "Governor in Council" and "Victoria", respectively. The Victorian legislators dealt with the local problems by stopping short of importing certain Part III provisions which were in conflict with those of the 1890 Act. One glaring incongruity was the indiscriminate adoption of English legislation on seamen which, though not in conflict with colonial legislation, had no relevance. Consequently, unlike the previous practice, the Marine Act 1928<sup>48</sup> (Vic.) followed a selective approach. Section 234 was expressed to import into Victoria only those provisions of Part II of the Imperial 1894 Act relating to specific aspects of seamen. The Marine Act 1958 (Vic.)<sup>49</sup> re-enacted the provision which was later repealed.

#### 4. Queensland

The bulk of the statute law which Queensland had inherited from New South Wales in 1859 was found in the Merchant Seamen Act 1847,<sup>50</sup> the Merchant Seamen Act 1849,<sup>51</sup> and the Merchant Seamen (Foreign) Act 1852.<sup>52</sup> The legislative stagnation in this area of the law for almost eight decades shows the slow development of seafaring and maritime trade in the colony. The above three Acts continued to apply until their repeal by the Navigation Acts Amendment Act 1939 (Qld.).<sup>53</sup> The position of Queensland thus differed markedly from that of each of the other three States.<sup>54</sup> Moreover, the Queensland legislature made no attempt

48. Act No. 3728.

49. This Act (No. 6302) (Vic.), currently in force, was reprinted on 25th March, 1979, incorporating amendments by Act No. 9178. The Seamen's Act 1958 (No. 6362) (Vic.) is only concerned with water police and foreign seamen. Victorian seamen must therefore look to the unenacted maritime law and, wherever possible, the Navigation Act 1912-73 (Comth.) for protection.

50. 11 Vic. No. 23 (New South Wales Act).

51. 13 Vic. No. 28 (New South Wales Act).

52. 16 Vic. No. 25 (New South Wales Act), including the Water Police Act 1853 (17 Vic. No. 36).

53. See Schedule I to the 1939 Act (3 Geo. VI, No. 26).

54. Surprisingly, the Navigation Act 1876 and the amendments made thereto up to 1933 had added little to Queensland law on seamen, e.g. Port Dues Revision Act 1882 (46 Vic. No. 12); Navigation Act Amendment Act 1896 (60 Vic. No. 31); Navigation Acts Amendment Act 1930 (21 Geo. V No. 21); and Order in Council published in Gazette, 25th November, 1933.

to import into the colony any English legislation on seamen. Her first move to align herself with Britain's Empire-building programme came late in 1939, with the passing of the Navigation Acts Amendment Act, 1939. Part IV of the Act not only consolidated the law for the protection of seamen previously introduced by the New South Wales Merchant Seamen Act 1849, but also invested them with rights to further wages. For example, where the ship did not proceed to the port of discharge mentioned in the agreement made with the seamen, he was entitled to be discharged and paid wages until the time of his arrival at the proper return port.<sup>55</sup> A rigid distinction was drawn between personal loans made to seamen and seamen's wages for which special protection was given. To prevent financially hard-pressed seamen from exploitation by unscrupulous shipowners, the Act invalidated agreements as to any wage advance made to, or paid on account of, seamen. In respect of any money paid as advance, no deduction was permitted from seamen's wages. Also such creditors had no right of action or set-off against the wages of seamen. This protection extended to persons to whom the wages were assigned.<sup>56</sup> One problem often encountered by seamen was the late payment of wages. The Act dealt with the situation by providing that where a seaman's wages were not paid or settled at the end of the voyage or agreement they would continue to run and be payable until the final settlement.<sup>57</sup> An uncertainty which could financially cripple seamen was the loss of wages through the loss or wreck of the ship. Again the law alleviated the hardship by conferring on them two months' wages and the right to a free passage back to the agreed port.<sup>58</sup> The protection of a seaman's

55. Navigation Act Amendment Act 1939, s. 38 (5).

56. Ibid., s. 36 (1), (2) and (3). Seamen's wages were not subject to any court attachment or arrestment, nor to any prior assignment. No power of attorney or authority given by seamen for the receipt of wages was irrevocable. Payment of wages to seamen or apprentices was valid despite any previous sale or assignment thereof: s. 46; see also Queensland Marine Act 1958 (7 Eliz. II No. 37), s. 75.

57. Ibid., s. 37 (8).

58. Ibid., s. 42 (1).

rights to wages, including his lien on the ship and other remedies originally conferred under the Merchant Seamen Act 1849 (N.S.W.), was extended to apprentices.<sup>59</sup>

The high-water mark of the statutory protection was reached when liens for seamen's and apprentices' wages were given priority over "all other liens."<sup>60</sup> The significance must be seen in the light of competing claims. If the proceeds of the sale of a ship were inadequate to meet the claims of all the creditors, seamen's wages had to be paid first. Moreover, the special status of seamen's wages was not negotiable. Any stipulation in an agreement which varied or was inconsistent with the top priority given to wage lien under the Act was struck down.<sup>61</sup> For the first time, a master's liens and remedies for the recovery of his wages were extended to the recovery of disbursements or liabilities properly incurred by him as master on account of the vessel.<sup>62</sup>

The Queensland Marine Act 1958 has included under the category of seamen all persons engaged on board in whatever capacity. Prescribed allowances are included as wages.<sup>63</sup> The effect is the extension of the rights and remedies in respect of seamen's wages to all persons engaged on board. The Act adopts the correct approach by not condoning default, neglect or breach of duties on the part of any seaman. As under English maritime law, a seaman's wages are not dependent on the earning of freight. However, they are not payable if it is proved that he has not exerted to the utmost to save human life, the

59. Ibid., s. 42 (2). As in the other states, the common law principle was given statutory effect, ie. the right of a seaman or apprentice to wages was not dependent on the earning of freight: s. 41 (5). See e.g., the Seamen's Laws Consolidation Act 1864 (27 Vic. No. 13) (N.S.W.), s. 40.

60. Ibid., s. 41 (2).

61. Ibid., s. 41 (3).

62. Ibid., s. 48; similar to Seamen's Laws Consolidation Act 1864 (27 Vic. No. 13) (N.S.W.), s. 50.

63. (1958), 7 Eliz. II No. 37, s 71 (1). Seamen discharged before completion of full employment term were entitled to recover wages up to the time of discharge: s. 74 (3).

ship, cargo, stores or the equipment.<sup>64</sup>

#### 5. South Australia

This settlement was proclaimed a colony in 1836. Decisions of both the Supreme Court of South Australia and the High Court of Australia have confirmed that for the purpose of application of English laws that province is to be regarded as if it "never had any association with the mother colony."<sup>65</sup> Consequently, for the first two years after settlement the seamen were governed by the body of English laws transferred on 28th December, 1836.<sup>66</sup> Historically, the debut of local legislation on shipping and crews came in 1838.<sup>67</sup> Some encouragement to seafaring as an integral part of Britain's Empire-building policy was given in 1852. Legislation was passed<sup>68</sup> to facilitate the engagement and discharge of seamen at the Port of Adelaide. At the turn of the decade, the spectacular increase in the seafaring workforce and the numbers of ships calling at her port led to new measures being implemented. By the 1860 Act, the Marine Board of South Australia was established to exercise jurisdiction over the owners, masters and seamen of British ships in the colony, including the power to require the production of documentation relating to seamen.<sup>69</sup>

64. *Ibid.*, s. 70 (5). The 1958 Act and the amending Acts are collectively referred to as the Queensland Marine Acts 1958-1979.

65. White v. McLean (1890) 25 S.A.L.R. 97, at p. 100, per Boucaut J. and Delohery v. Permanent Trustee Co. of N.S.W. (1904) 1 C.L.R. 283, at p. 297, per Griffith, C.J.

66. This date is legislatively defined in the South Australian Ordinance No. 2 of 1843.

67. Act No. 3 of 1838 (S.A.). This Act represents the earliest attempt to regulate seamen in the colony. Four years later this Act was extended by Act No. 18 of 1842 (S.A.).

68. Act No. 24 of 1852 (S.A.).

69. Act No. 17 of 1860 (S.A.). As regards its other duties and functions, see ss. 10-15, 18, 40, 69, etc.

Aside from the other salutary aspects, this Act introduced into seafaring the essential ingredients to make it a viable career. As in the other colonies, stringent mandatory requirements were laid down to regulate the payment of crews' wages, their employment and discharge.<sup>70</sup> In common with the situation elsewhere, no seaman could be carried to sea unless an agreement in the manner prescribed containing the statutory particulars was first signed.<sup>71</sup>

To prevent exploitation, the Act prohibited the discharge of seamen except after payment of their wages made before a Shipping Master at a port.<sup>72</sup> Also, a seaman's presence was required for the signing by the master or owner of mutual release of claims regarding the past voyage or engagement.<sup>73</sup> In favour of seamen, the law made it obligatory for the master to sign a report sanctioned by the Marine Board as to the conduct, character and qualifications of the persons discharged.<sup>74</sup>

The 1860 Act stopped fairly short of giving effect to the "British seamen" concept. Glaring discrepancies existed between the rights and protection of seamen under English law and those of seamen under South Australian law. Colonial shipowners began to experience the drain of able-bodied seamen to the United Kingdom. The deteriorating situation, unless rectified, would gravely undermine the morale of seamen and seafaring in South Australia. Rather than embarking on extensive reforms which might still not produce the desired result, the legislators utilised the law-reception mechanism. Section 45 of the Marine Board Amendment Act 1873 (S.A.)<sup>75</sup> made applicable to South Australian-registered ships, including their owners, masters and crews when they were within the colony's jurisdiction, certain provisions of

70. Ibid., ss. 63 and 70.

71. Ibid., s. 65.

72. Ibid. s. 67.

73. Ibid., s. 68.

74. Ibid., s. 69.

75. No. 6 of 1873.

Part III of the Imperial Merchant Shipping Act 1854. These provisions related to seamen's "rights to wages and remedies for the recovery thereof, to the shipping and discharge of seaman...to the powers of seamen to make complaints, to the protection of seamen from imposition..."

Continuing uniformity between colonial and English laws relating to seamen was maintained by section 9 of the Marine Board Act 1876 (S.A.). It extended to South Australia the above provisions and any Imperial Act amending any of the matters in so far as it was applicable and consistent to form part of the law of the colony. South Australia's enthusiasm to align herself with Britain's seafaring policy reached a high level at this stage. In a surprising move, her legislature invested the 1876 Act with what appeared to be extraterritorial operation of a dubious nature. The law was stated to apply to all British ships, wherever registered, to South Australian-registered ships, and to the masters and crews of such ships, even though they were out of the colony's jurisdiction.<sup>76</sup>

It is reasonable to presume that the colonial legislature had realised its blunder and the invalidity of the 1876 Act on constitutional grounds. The Marine Board and Navigation Act 1881 (S.A.).<sup>77</sup> was confined in its application to masters, mates and crews of British and South Australian-registered ships. It had, however, one grave shortcoming. The crews of non-British ships were left out of its scope. In a number of respects, the new remedial measures introduced by the Act served to improve the terms and conditions of seafaring. They related to apprenticeship to the sea service,<sup>78</sup> the rating of seamen<sup>79</sup> and the property of deceased seamen.<sup>80</sup> Under the Act, ships' masters

76. No. 50 of 1876, s. 9. s. 2 provided that the Act was to be construed as one with the Marine Board Act 1860 (S.A.) and the Marine Board Amendment Act 1873 (S.A.).

77. No. 237 of 1881.

78. Ibid., ss. 45-48, similar to 1854 Act (Imp.), ss. 141-145.

79. Ibid., s. 130.

80. Ibid., ss. 93-101, which were modelled on a number of the provisions in the 1854 Act (Imp.), e.g. ss. 194, 195, 199, 202, etc.



enjoyed similar remedies as seamen with regard to the recovery of wages.<sup>81</sup>

To meet the pressing needs of poor seamen, a departure was made from the usual trend of the law against the prepayment of wages. Section 73 of the 1881 Act was amended<sup>82</sup> to permit agreements made with seamen to stipulate the advanced payment of not more than one month's wages. All other payments made in contravention of the law would not be deductible from seamen's wages. They would also not be recoverable in any action or "set-off" claim against seamen or their assignees.<sup>83</sup> These measures were considered necessary to protect seamen, hard pressed by financial circumstances, from unconscionable shipowners and demise charterers. One of the recurring grievances which undermined the viability of seafaring in the colony stemmed from shipowners' default in paying their employees' wages. Often the inferior economic position of seamen and the predominance of shipowners complicated the situation. It was for the 1902 Act (S.A.) to provide that, in all cases of ships trading in the colony and where seamen were engaged under time agreements, all wages earned had to be paid monthly.<sup>84</sup>

The onerous and often personal liability thrust upon ships' masters by reason of the nature of their responsibility<sup>85</sup> had been a problem under South Australian law. This serious defect was cured by the Marine and Navigation Act Further Amendment Act 1906 (S.A.). For the recovery of disbursements and liabilities properly incurred by the master on the ship's account, he and every person lawfully authorised to act as such were given the same rights, liens and remedies as a master had for recovering his wages.<sup>86</sup> The rights and remedies of masters and seamen have been consolidated in the Marine Act 1936<sup>87</sup> (S.A.), which is currently in force.

81. Ibid., s. 92, similar to Imperial Act, s. 191.

82. By the Marine Board and Navigation Act (No. 814 of 1902) (S.A.), s. 24.

83. Act No. 16 of 1881, s. 73, as amended by Act No. 814 of 1902, s. 24 (2).

84. Act No. 814 of 1902, s. 32.

85. As to the master's liability for compensation for breach of contract concerning the passage of any passenger, see Act (No. 8 of 1852) (S.A.).

86. Act No. 917 of 1906, s. 6 (1), (2) and (3).

87. Act No. 2337 of 1936-1937. The Marine Act 1936-1975 (S.A.) has incorporated many of the amendments.

## 6. Western Australia

The date set by the Interpretation Act of Western Australia for the application of English statute law to this colony is 1st June 1829.<sup>88</sup> There is no indication that for the first seven decades English laws received into the colony were inadequate to meet the needs of its seamen and the problems of seafaring.<sup>89</sup>

One of the occupational hazards of seamen in the early days was to be stranded overseas after the wreck of their ship, or to be left behind in a foreign port, sick and penniless. The colony's first significant contribution to Britain's Empire-building programme was to promote the welfare of the colony's seamen. Under the 1871 Act (W.A.),<sup>90</sup> the Governor was given the power to direct certain payments to be made for the benefit of needy seamen. Such financial assistance was available to seamen who had served in Western Australian ships and had been shipwrecked, discharged or left behind in any place outside the colony. The underlying object of the Act, apparently one of the few enactments of its kind in the history of Australian maritime law, was twofold. It was to encourage third parties and the public to give financial support and relief to seamen in distressed circumstances. These who had voluntarily incurred liability or provided financial or other assistance could expect to be reimbursed.<sup>91</sup>

The Merchant Shipping Act Application Act 1903 (W.A.)<sup>92</sup> represented a historic boost to the development of the law on seamen. It reflected an overt alignment by the colony with Britain's policy relating to merchant seamen. The advantages which accrued were noteworthy. It spared the colonial legislature the cumbersome task of

88. 9 Geo. V No. 20, s. 43.

89. It is probably because the level of shipping activity was low. Enid Russell, A History of the Law of Western Australia and its Development from 1829-1979 (1980), pp. 165-166, says that there are "no admiralty cases in the law reports between 1935 and 1939."

90. (1871) 34 Vic. No. 2.

91. The Act of 1880 (44 Vic. No. 1) (W.A.) further provided that shipwrecked seamen found in the United Kingdom would be relieved and sent home at the public expense.

92. 3 Edw. VII (No. 7 of 1903), amended by Act (No. 23 of 1919).

reforming and updating its law in a manner that would fit into the general pattern that was well established in the other Australian colonies at this time. Similarity in the laws meant parity between English and colonial seamen, thus giving effect to the concept of "British seamen." By the colonial Act of 1903, Part II of the Imperial Merchant Shipping Act 1894 was extended to "all British ships registered at...or being at any port in Western Australia and to the owners, masters and crews thereof so far as it is not already applicable...."<sup>93</sup> The Governor was authorised to appoint officers to perform the same functions as their English counterparts pursuant to Part II of the Act.<sup>94</sup> The expressions "Board of Trade" or "Board" and "United Kingdom" were amended to read "Governor" and "Western Australia," respectively.<sup>95</sup>

Unlike the other States, Western Australia has adopted a logical approach by drawing a demarcation line between coast-trade and Empire-wide shipping. Section 8 (1) of the Western Australian Marine Act 1948 defines a "coast-trade ship"<sup>96</sup> as a ship, including a steam tug, engaged in trading or going between any ports within the State's jurisdiction. Section 110 (1) is expressed to apply to coast-trade ships of eighty tons registered tonnage or over. The combined effect of section 8 (1) and section 110 (1) is the creation of a distinct class of local seamen. Their engagement, conditions of employment, and

93. Ibid., s. 2 (1). Part II of the 1894 Act (Imp.) has been repealed by the English Merchant Shipping Act 1970 (1970 c. 36), s. 100 and Schedule 5. Although English law relating to seamen and masters is consolidated in this Act, it is a separate Act and not expressed as a substitution for the repealed law in Part II. It is submitted that the 1970 Act will not replace Part II of the 1894 Act which will continue to have the force of law in Western Australia.

94. Ibid., s. 2 (3).

95. Ibid., s. 2 (2).

96. However, by the Western Australian Marine Act 1966, s. 4 (b) a "coast-trade ship" in Part III of the Western Australian Marine Act 1948 does not include a limited coast-trade vessel.

discharge are subject to the provisions of Part VII of the Western Australian Marine Act 1948. The Act seeks to implement objects in the best interests of the State and its seamen. This inference is based on the fact that Part VII is made up of selected provisions drawn from a number of enactments.<sup>97</sup> Incorporated in the Act for the protection of local seamen and their rights are safeguards specially adapted to the needs of the State.<sup>98</sup>

### III. NAVIGATION

#### 1. New South Wales

There is no suggestion that English port authority laws, mainly of statutory origin, were received into the colony. The body of unenacted rules and statute law so imported had no relevance to port administration.<sup>99</sup> The Acts passed by the colonial legislature within the first 30 years of settlement were the spadework to establish harbour facilities for shipping trade and communications with the outside world.<sup>1</sup> Central to the system were the Steam Navigation Board and the Pilot Board, which were later replaced by the Marine Board under the 1871 Act.<sup>2</sup> The first traces of maritime law were connected with the duties of the Marine Board<sup>3</sup> in reducing navigational hazards and

97. I.e. the Merchant Shipping Act 1894 (Imp.), the Navigation Act 1912 (Comth.), including some of the amendments, and the Queensland Navigation Acts Amendment Act 1939.

98. By the 1948 Act (W.A.), s. 8 (1) admiralty jurisdiction is defined to cover the navigable waters within one nautical league of the coast and the inland navigable waters of the State.

99. See the earlier part of this chapter.

1. (1840) 4 Vic. No. 4 (N.S.W.) dealt with the preservation of ports, harbours navigable rivers, etc.; 4 Wm. IV No. 7 (N.S.W.) regulated the police in the Port of Sydney and prevented nuisances and obstructions therein. The finance required for the port facilities and their maintenance was raised by imposing pilotage rates, wharfage rates, dues and other charges.

2. 35 Vic. No. 7 (N.S.W.), ss. 1 and 2. This Act repealed and consolidated some 13 Acts on shipping.

3. For the wide-ranging powers of the Marine Board, see ss. 17-27.

preventing accidents in those areas within its jurisdiction. The 1871 Act contained some of the early elements of maritime law. At the time when marine trade in the colony and elsewhere was fast expanding, the most serious causes of shipping disasters were collisions on the high seas, in busy ports and along waterways. Often unfamiliarity with the sailing rules,<sup>4</sup> which varied in different countries, and the lack of pilotage assistance accounted for the high toll of accidents. New South Wales is seen as one of the early advocates of worldwide maritime safety. Along with thirty-one other countries, she gave statutory effect to the collision regulations, the most advanced by the standards of the time.<sup>5</sup> Apart from the mandatory obligation of all shipowners and masters to observe the regulations,<sup>6</sup> their preponderant effects are demonstrated by two nineteenth-century cases. From the viewpoint of navigational safety on the high seas, the advantages of adopting a common set of rules for international shipping are exemplified in The A.H. Badger.<sup>7</sup> A British barge on a voyage from New South Wales to New Zealand collided with an American ship. By an Act of Congress of April 1864, the British collision regulations enacted under the Imperial Merchant Shipping Amendment Act 1862 were rendered applicable to American ships when they were beyond the limits of British jurisdiction. Stephen, C.J., said:<sup>8</sup>

4. As to the rule of navigation applied by the Court of Admiralty in England, see The "Woodroop-Sims" (1815) 2 Dods. 82, p. 87, supra.
5. They were the same as those proclaimed by the Queen in Council on 9th January, 1863, and 30th July, 1868; and applied to ships belonging to countries and places whether within the British jurisdiction or not: (1871) 35 Vic. No. 7 (N.S.W.), Schedule G.
6. Ibid., s. 96.
7. (1872) 11 S.C.R. (N.S.W.) 157.
8. Ibid., pp. 171-172.

"Practically, therefore in respect of all the rules of navigation, and rules concerning lights, the law administered in the Admiralty Courts of Great Britain and the United States in cases of collision on the high seas is the same. The simple difference is this - that in the United States...the decisions are founded on the general law or usage of the sea, evidenced by written rules or statutes identical in both countries, whereas in the British Courts the decisions rest directly on the rules, as the expression of that law and usage."

The direct link as a weighty factor between the non-observance of the collision regulations and fault in a collision was long recognised by the Vice-Admiralty Courts. In The Kurrara, the Judge Commissary said:<sup>9</sup>

"...there is no rule customary or otherwise which prescribes how a vessel approaching this harbour is to enter it, nor is there any point within the line of safety at which she must pass from the sea to the harbour; the rules for preventing collisions are the sole matter with which the master must comply and which he has to take into his consideration."

By the 1871 Act (N.S.W.),<sup>10</sup> the non-observance of any regulations made under it would give rise to two forms of presumption. The twofold consequences imposed were intended to avoid the grave risks which would otherwise be entailed. By section 97, where personal injuries or property damage was caused by the non-observance of any regulation, the loss or damage was deemed to have resulted from the wilful default of the person in charge of the ship's deck. This presumption, however, could be rebutted by proof to the court's satisfaction that departure from the regulations was rendered necessary by the circumstances. Moreover, in any case of collision due to the non-observance of any regulation, the ship which failed to observe it would be deemed to be at fault unless the proviso was applicable.<sup>11</sup>

9. (1889) 10 N.S.W. R. 1, p. 4.

10. (1871) 35 Vic. No. 7.

11. Ibid., s. 98. As to powers of the Governor to enact regulations, see Navigation Act 1901-1949 (N.S.W.), s. 113, as amended by Navigation (Amendment) Act (No. 8 of 1954) (N.S.W.), s. 2.

The common law position of a master was dramatically altered by the colonial legislature. In every case of collision between two ships, the master was - wherever possible and necessary - duty-bound to render assistance to the other ship and persons on board. This "mutual help" obligation was enforceable by the suspension or cancellation of the certificate of the master or officer who was guilty of default.<sup>12</sup>

Three decades later, the Navigation Act 1901 (N.S.W.)<sup>13</sup> was passed as a consolidating measure. It stands out as a fine example of how maritime law takes cognizance of and gives effect to nautical technology and expertise in navigation. The Act contains many safety provisions. They relate to navigation, the prevention of accidents, the seaworthiness requirements, life-saving appliances,<sup>14</sup> deck and load-lines, and the carriage of dangerous goods, including a more comprehensive set of collision regulations in the Seventh Schedule. These revamping features are deemed necessary to keep pace with the developments prevalent in many of the countries with which New South Wales has enjoyed close shipping links. Viewed from the maritime law angle, this Act together with the subsequent amendments has its thrust towards promoting the safety of navigation involving all types of ocean-going vessels. It applies to passenger steamships and trade ships. Moreover, it extends to ships mechanically-propelled, whether British or foreign,<sup>15</sup> plying between any New South Wales port and

12. Ibid., s. 102.

13. No. 60 of 1901, which repealed the 1871 Act together with a number of amending Acts.

14. Ibid., Part VII. As to the detailed rules on life-saving appliances, see the Sixth Schedule.

15. By Navigation Amendment Act 1941 (N.S.W.), s. 2, the provisions of the Navigation Act 1901-1935 (N.S.W.) relating to steamships and steam navigation are, subject to certain modification, extended to mechanically-propelled vessels and their navigation.

another port in any of Her Majesty's Dominions.<sup>16</sup>

## 2. Tasmania

Since the early days, unlike in the other States, shipping trade and activities in Tasmania had developed around a number of ports and seaside towns, and were not confined to Hobart. The foundation of Tasmania's navigation law was laid by the 1856 Act.<sup>17</sup> An ingenious effort was made to adopt certain provisions of Part III of the Imperial Merchant Shipping Act 1854 to regulate the growing shipping traffic around the island. The Governor of Tasmania was empowered to establish Shipping Offices and appoint Shipping Masters in the same way as the Board of Trade in Britain!<sup>18</sup> However, it was not until the 1889 Act<sup>19</sup> was passed that the internationally-accepted norms basic to safety in navigation were introduced. It was a misdemeanour for any person involved in sending, or attempting to send, to sea a ship in such an unseaworthy state as to endanger life.<sup>20</sup> The thrust of the law towards the protection of human lives at sea was necessitated by the increasing use of large steamships as the major mode of transporting passengers |

16. Act No. 60 of 1901 (N.S.W.), s. 33 (1). The Governor is empowered to extend the application of the Act to any ship trading between any New South Wales port and any other port outside Great Britain or Ireland: s. 33 (2).

17. (1856) 19 Vic. No. 21 (Tas.).

18. Ibid., s. 1. The powers exercisable by the Governor included those vested in the Local Marine Boards under Part III of the 1854 Act (Imp.).

19. 53 Vic. No. 34 (Tas.). The jurisdiction of the Marine Board of Hobart under this Act was considered in McArthur v. Cheverton (1907) Tas. L.R. 89. C was charged with having caused ponderous matter to be thrown into the port of Hobart in breach of s. 77. As the offence was committed within high and low water mark, the court held that it was not within the Board's jurisdiction which extended to or above the high-water mark only.

20. Ibid., s. 140.



at the close of the nineteenth century. To the owners and operators of steamships, more crippling than the pecuniary penalty imposed for the offence, was the result of the exercise of the power under section 141. As part of its duties, the Marine Board was empowered, particularly where human life would be endangered, to detain and carry out a survey of the ship. The underlying object of the legislation was to reduce the loss of life and property. A number of compulsory measures were introduced by the Act to secure the ship's seaworthiness as the major safety factor. They included the marking of deck and load lines,<sup>21</sup> the full range of proper equipments designated for the ship,<sup>22</sup> the complement of duly certificated crew and other requirements to be met.<sup>23</sup> However, in a number of ways, the 1889 Act (Tas.) is inadequate. It did not define seaworthiness or unseaworthiness.<sup>24</sup> In imposing the seaworthiness obligation, the Act made an unwarranted distinction between human life and property. It was not an offence for any one using a leaky vessel to carry goods if no life was endangered! Even where human life was endangered, the person charged with the offence, including the master, could escape conviction by proving that "sending her to sea in such unseaworthy state was reasonable and justifiable."<sup>25</sup>

A breakthrough in the area of navigational safety has come through the Marine Act 1976 (Tas.). Section 135 (1) empowers the Governor to enact regulations relating to the prevention of collisions, the lights to be carried and the signals to be used by vessels. The constructive step taken was the passing of legislation similar to that of other countries. This approach enables Tasmania to implement changes periodically initiated by advanced maritime countries. By the collision regulations, effect may be given to such international

21. Ibid., ss. 150-153.

22. Ibid., ss. 154-156.

23. Ibid., ss. 157-159.

24. "Unseaworthiness" is defined in Marine Act 1976 (No. 18), s. 122. An unsafe vessel may be detained for inspection: ss. 124-128.

25. Ibid., s. 140.

treaties, agreements, conventions, etc. which are "in force", as the Governor considers desirable.<sup>26</sup> An outstanding effort to produce uniformity in this area of the law is provided by the Marine (Collisions) Regulations 1977 (Tas.).<sup>27</sup> The International Regulations for the Prevention of Collisions at Sea 1972 are given the force of law within Tasmanian territorial waters.<sup>28</sup>

In one respect, Tasmania was ahead of the other States. Mandatory observance of the collision regulations by every master or owner of a vessel was introduced early in 1976. The sanction to enforce the regulations for the promotion of safety at sea and certainty in navigation is the presumption of fault for non-observance.<sup>29</sup> This could give rise to serious implications. A new element to strengthen the force of the regulations is introduced by the Marine (Collision) Amendment Regulations 1979 (Tas.).<sup>30</sup> Regulation 5 reads:

"In proceedings taken against a person for an offence alleged to have been committed in contravention of the ...regulations, an averment by the complainant contained in the complaint is prima facie evidence of the matter averred."

The above regulation operates to shift to the defendant the onus of proving to the court's satisfaction that the charge is unfounded, or the availability of one of the defences provided in the

26. Marine Act 1976, s. 135 (2).

27. Statutory Rules (No. 88 of 1977) (Tas.).

28. By para. 3 (3) of the Statutory Rules 1977, the 1972 rules are expressed to apply to all vessels used or capable of being used for the purposes of navigation on (a) all waters within a marine board's jurisdiction, and (b) the waters of all inland lakes, rivers and streams (whether within the jurisdiction of a marine board or not). Subject to certain amendments, the 1972 rules are given the force of law in England on 1st June, 1983, by the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1983, reg. 1 (1), s. I. No. 708 of 1983.

29. Marine Act 1976, s. 136 (2).

30. Statutory Rules, No. 55 of 1979, which have amended the Marine (Collision) Regulations 1977 by inserting a new regulation 5. As a subsidiary legislation, it could have been ultra vires. Its validity is affirmed as a result of the amendment to s. 135 of the 1976 Principal Act by the Marine Act (Tas.) (No. 125 of 1977), s. 6. The Board's powers to make by-laws under s. 198 of the Principal Act for the prevention of collisions were extended by s. 9.

Regulations.<sup>31</sup> In contrast, the other States do not have similar legislation. It signals an important pragmatist move by the Tasmanian Parliament to reinforce the existing law, by further promoting the safety of life and property at sea. Section 8 of the Marine Act 1977 (Tas.) makes it possible for the legislation to be rigorously enforced without fear of liability for any loss or damage that may be caused. It applies to the exercise in good faith by any warden, member or employee of the Navigation and Survey Authority of Tasmania or a Marine Board of any power, function or duty under the Act. Statutory immunity is conferred in respect of any act done or omission in fulfilling any such function or duty.

### 3. Victoria

One of the grave navigational hazards in Victorian territorial waters was the lack of statutory directions.<sup>32</sup> The rules of sailing based on common usage,<sup>33</sup> though adequate in fine weather, proved totally ineffective in poor visibility conditions and with the dramatic rise in marine traffic. The reasons for the first Victorian Act,<sup>34</sup> which related to the lights to be carried and the signals to be used by sea-going vessels, can best be understood in that context. In the second half of the nineteenth century, when steamships became the single largest mode of transporting passengers, the legislature had to review the safety criteria. The Passengers Harbour and Navigation Act 1865 (Vic.)<sup>35</sup> was passed to meet the problems. It imposed on shipowners, masters and others a number of compulsory requirements.<sup>36</sup>

31. E.g. Marine (Collision) Regulations 1977, Rule 2 (b) proviso or Rule 38 exemptions, if applicable.

32. However, between the separation of Victoria in 1851 and 1865, twelve Acts dealing with local shipping were passed. Five of them dealt with ports, wharfs, payment of wharfage and harbour rates (16 Vic. No. 12, 17 Vic. No. 18; 17 Vic. No. 27, 17 Vic. No. 28 and 27 Vic. No. 209); five with the regulation of passenger conveyance (18 Vic. No. 5, 18 Vic. No. 25, 19 Vic. No. 7, 25 Vic. No. 133 and 27 Vic. No. 174); one with the amendment of mercantile law (27 Vic. No. 182); and only one had some bearing on maritime law.

33. As to such rules, see supra.

34. 16 Vic. No. 25 (Vic.).

35. 28 Vic. No. 255.

36. Provision was made in her certificate as to the maximum number of passengers allowed to be carried on board: ibid., s. 103.

Apart from the penalties imposed for breach, it required certain precautionary measures to be taken, e.g. the installation of fire fighting and life-saving equipment.<sup>37</sup> Observance of the collision regulations was enforced by two statutory presumptions - both rebuttable. The presumption of wilful default operated against the deck officer personally under section 119, while the presumption of fault under 120<sup>38</sup> would render the ship liable.

The Marine Act 1890 (Vic.)<sup>39</sup> represented new efforts to revamp the law. It broadened the scope of control over navigation in Victorian waters by the use of an updated version of the collision regulations.<sup>40</sup> Safety of navigation and the prevention of accidents at sea were the twofold object of Part VI of the Act. Apart from strengthening the pre-existing requirements as to the standard equipment, e.g. lights, fog signals, etc., new provisions to deal with the problems of unseaworthy ships and overloading were introduced.<sup>41</sup> It was not the legislative object to attempt to provide a fool-proof system of marine transportation. Moreover, far from pursuing an approach to pave the way for uniformity, the Victorian court had construed the concept of seaworthiness only in the narrow compass of the 1890 Act. In Kilpatrick v. Huddart, Parker & Co. Ltd.,<sup>42</sup> the plaintiff sued the defendant shipowners for damages for sending to sea their ship in an unseaworthy condition in breach of section 103 of the Marine Act 1890. The ship, which had been surveyed by the Marine Board and issued with a certificate of fitness for sea traffic, foundered and all her crew were drowned except her cook! Madden, C.J., held that the Board's certificate granted under the 1890 Act was conclusive as to the state

37. Ibid., ss. 107 and 108.

38. Unless it was proved to the satisfaction of the court in each case that the circumstances made departure from the regulations necessary: ss. 119 and 120.

39. No. 1165; repealed: the Passengers Harbour and Navigation Act 1865.

40. See the Sixth Schedule.

41. Ibid., ss. 99-112; 119-122, respectively.

42. (1895) V.L.R. 125.

and condition of the ship at the time of the issue. The rule was said to be subject to one exception. This was where shipowner or his agent had fraudulently concealed the defects or neglected to provide against obvious defects which were calculated to endanger the ship.

After the Commonwealth was established, the Victorian legislature confined the operation of this area of maritime law to its territorial waters. Minor exceptions aside, the provisions of Part VI of the Marine Act 1915 (Vic.) were expressed to apply to "all British ships registered or being at any place within Victoria and to no others."<sup>43</sup> Apart from the fear that the Act might be held ultra vires, the Act is viewed in one respect as a retrogression, especially when Victoria was vying for a large share of international shipping trade involving non-British vessels. The Marine Act 1958 (Vic.),<sup>44</sup> currently in force, has consolidated the law. It has incorporated new elements introduced in a piecemeal fashion by the legislature over nine decades. Prior to its enactment, the Victorian shipping industry had to grapple with two difficulties. The first of these was created by owners and operators of ships who, for the purpose of gain, had no disregard for human life and property. Part VI Division 2 makes it an indictable offence<sup>45</sup> for any person who is in any way involved in sending a ship to sea from any Victorian port in such a state as to endanger the life of any person.<sup>46</sup> A master who knowingly takes such a ship out to sea could be convicted of a similar offence. It is therefore a distinct improvement over the common law position. The mandatory undertaking as to the ship's seaworthiness is implied in every employment contract made between the shipowner and the seaman, including the master, and also in every apprenticeship instrument. Under the Act, the shipowner, master or agent is duty-bound to use all reasonable means

43. S. 93. For definition of "British ship", see Chapter Four.

44. No. 6302, reprinted on 25th March, 1979. Part V Division 6 dealing with deck and load lines has been amended by Marine Act (No. 8293 of 1972) (Vic.), s. 9.

45. As amended by Marine (Amendment) Act (No. 9576 of 1981) (Vic.), s. 11 (1) substituting "indictable offence" for "misdemeanour."

46. Marine Act 1958 (Vic.), s. 97.

to ensure the seaworthiness of the ship for the voyage at its commencement, and to keep her in such condition during the same.<sup>47</sup> The second problem was due to the operation of a common law rule that a person is not liable for not rendering assistance to another in distress. It has been amended by section 133. This imposes on every master or person in charge of each ship involved in a collision certain positive duties of mutual assistance, and also to provide the information required. A necessary outcome of this provision is the creation of a third presumption. The collision is deemed to have been caused by the party who is guilty of the breach.<sup>48</sup>

#### 4. Queensland

The problems of navigation, which endangered shipping in other colonies, did not apparently cause grave concern in Queensland for over a decade after she became a separate colony.<sup>49</sup>

The Navigation Act 1876<sup>50</sup> featured as the first Queensland Act on the subject. It put an end to the outdated sailing rules. Under Part IV of the Act, the Governor was empowered to enact regulations on the lights to be shown, the signals to be used and the sailing rules to be observed by vessels in Queensland waters.<sup>51</sup> In some ways, the regulations promulgated proved unsatisfactory. With effect from 1st November, 1882, the regulations made by Her Majesty in Council under the Imperial Merchant Shipping Amendment Act 1862<sup>52</sup> became

47. Ibid., s. 98.

48. Ibid., s. 133.

49. This was probably due to the slow growth of shipping traffic and to Queensland's extensive coast line.

50. 41 Vic. No. 3, representing the first attempt by legislature to consolidate and amend the law on shipping. The Marine Board of Queensland established under s. 5 was charged with a broad range of duties and responsibilities under Parts I and II, including the enactment of regulations under s. 93.

51. S. 80 was substituted for the original section by the Ports Dues Revision Act 1882 (46 Vic. No. 12) (Qld.), s. 13.

52. 26 Vic. c. 63, s. 32, later repealed by the Imperial Merchant Shipping Act 1894. The collision regulations of 16th May, 1901, were published in Government Gazette of 9th June, 1901, and also rescinded the regulations relating to signals and distress appended to Schedule D of the 1876 Act (Qld.).

operative in Queensland waters. Observance of the regulations was secured by penalties imposed for wilful default. Presumption of wilful default would also arise where property damage or personal injuries occurred as a result of non-observance of the regulations.<sup>53</sup> The Queensland legislature appeared to have been able to come to grips with some of the underlying problems which sprang from the ship's unseaworthiness. Stringent provisions were introduced as to the personnel required to man the vessels and the equipments to be installed on board. However, the concept, though sound as an axiom, did not in practice prevent profit-greedy owners and operators of ships from endangering the lives on board by overloading.

To deal with the situation, the Navigation Act Amendment Act 1896 (Qld.) made the marking of deck lines and load lines mandatory.<sup>54</sup> The legislation, originally applicable to steamships, was extended to ships propelled by other forms of power.<sup>55</sup>

After the law had apparently fallen into decadence for over sixty years, the Queensland Marine Act 1958<sup>56</sup> was passed as a revamping measure. The law was brought into line with the modern shipping policy of the State. It provides strict criteria for achieving safety in navigation and for preventing accidents at sea. Unlike<sup>57</sup> any innovations considered so far, a new presumption is created to deal with the problems of unseaworthy ships. Subject to the proviso, a ship is deemed to be unseaworthy under the 1958 Act unless she

53. Navigation Act 1876 (41 Vic. No. 3) (Qld.), s. 82.

54. 60 Vic. No. 31, ss. 6-15. These sections were modelled on the 1894 Act (Imp.), ss. 437-441.

55. Under the Navigation Acts Amendment Act 1911 (Qld.) (2 Geo. V No. 5), s. 4, the Governor was empowered to extend the application of the Navigation Acts 1876-1896 (Qld.). In New South Wales, however, such power was conferred thirty years later by the Act No. 27 of 1941.

56. 7 Eliz. II No. 37.

57. Ibid., ss. 111-123 on ship surveys; ss. 124-159 on safety and prevention of accidents; and ss. 183-195 on shipping casualties, misconduct, etc.

satisfies the conditions specified in section 125. A related facet of this approach consists of the preventive and punitive measures. Subject to the provisos, knowingly sending or taking to sea a ship in such an unseaworthy condition as to be likely to endanger life is a criminal offence.<sup>58</sup> Overloading of and overcrowding on passenger ships are prohibited. A duty is imposed on every shipowner and his agent to ensure that the ship is properly equipped.<sup>59</sup> Basic to the underlying objects of the Act is the establishment of a modern, uniform system of "rules of the road."<sup>60</sup> As in the case of Tasmania, statutory effect is given to the International Regulations for Preventing Collisions at Sea 1972.<sup>61</sup> Compliance with them is enforced by the presumption of wilful default against the deck officer where damage is caused by non-observance. For breach of the duty of mutual assistance which arises in a collision between two ships the defaulting master will be imprisoned. The penalty imposed is therefore more serious than the presumption of fault, wrongful act or neglect,<sup>62</sup> which may be rebutted. The likelihood that his certificate may be suspended or cancelled for breach of the collision regulations is an effective deterrent, even for the wayward master.

In two remarkable ways, the legislature has gone further than its counterparts in implementing the concept of safety at sea. Firstly, it is incumbent upon the master on receiving at sea a signal of distress or similar information to proceed at all speed to assist every person in danger of being lost. Without sufficient cause, he will be found guilty of a misdemeanour for failure to render such assistance.<sup>63</sup> Secondly, on encountering a dangerous derelict, a tropical storm or any other danger to navigation, the master of a ship is under a strict duty to warn ships in the vicinity and the shipping

58. Ibid., s. 126.

59. Ibid., s. 136.

60. The Governor in Council is empowered to enact collision regulations: s. 140 (1).

61. Government Gazette, 16th July, 1972. Thus Queensland shares the same forward-looking policy with Tasmania (see Statutory Rules No. 88 of 1977, supra.) in giving effect to the most recent international collision regulations.

62. Queensland Marine Act 1958, s. 143 (2) and (3).

63. Ibid., s. 144.



authorities on shore.<sup>64</sup> These statutory developments have markedly altered the common law position.

#### 5. South Australia

The South Australian Acts of 1838<sup>65</sup> and 1847<sup>66</sup> were enacted for the preservation of the ports, harbours and navigable rivers and for the regulation of shipping and the crews in the colony. Provisions were made for the maintenance of a steam tug, for pilotage and other port facilities.

The Marine Board Act 1860 (S.A.)<sup>67</sup> laid the groundwork for promoting safety and certainty in navigation. The Marine Board of South Australia was established, amongst other things, to formulate rules to be observed by ships when meeting and passing at sea. They also related to the lights to be carried on board and fog signals to be used.<sup>68</sup> Failure to observe the rules would give rise to the presumption of fault against the master. Often the unpredictable climatic and maritime conditions prevailing at the material time could operate to justify a departure from the rules.<sup>69</sup> To achieve its legislative objects, South Australia went one step ahead. Section 80 reads:

"If in any case of collision it appears to the Court...that such collision was occasioned by the non-observance of any rule...the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship...."

One implication of the section is this. A ship, which failed to observe the rules, could at any time be rammed into and sunk by another ship.

64. Ibid., s. 145.

65. Act No. 3 of 1838 (S.A.), one of the earliest Acts on shipping.

66. Act No. 13 of 1847 (S.A.).

67. Act No. 17; as to some of its main functions, see ss. 6-18; further powers were given under the Marine Board Amendment Act (No. 155 of 1879), (S.A.).

68. Marine Board Act 1860, ss. 77-79.

69. As to consequences otherwise, see s. 81.

It might be argued that adherence to the rules could relieve a master from liability for negligently running into another ship which violated the rules. Prima facie the shipowners would be unable to recover for the damage sustained, unless they could discharge the burden of bringing the case within the proviso. The Act stopped short of imposing liability for damage caused by the pilot's fault in situations where pilotage was rendered compulsory by law.<sup>70</sup> It is questionable whether, under the law at the time, the ship would be subject to admiralty proceedings in rem for damage caused to third parties as a result of a pilot's fault. However, following the pattern set by the other colonies, the presumption of wilful default was imposed on the deck officer, who was in charge, for violation of the rules.<sup>71</sup>

The Marine Board and Navigation Act 1881 (S.A.)<sup>72</sup> upgraded the law by introducing a number of new measures to promote the safety of navigation, life and property at sea. Two main methods to ensure observance of its provisions were used. In the first place, the Marine Board could exercise its wide powers to detain any unsafe ship, British or foreign, in South Australian waters.<sup>73</sup> This was a powerful weapon viewed with concern by wayward shipowners and charterers. For business purposes, detention of a ship would inflict heavy financial losses. Consequently, the fear of such an action being taken would lead to ships in the colony being properly maintained and kept under repair.

The second method based on the imposition of personal penalties appeared to be less effective than the first. Under section 174, subject to the proviso, any person involved in sending or attempting to send to sea an unseaworthy vessel endangering human life would be guilty of a misdemeanour. Also, the master who knowingly took to sea an unseaworthy ship in such circumstances would be guilty of a similar offence. It is doubtful whether the above provisions conferred any right on the persons injured to recover compensation. They were

70. Ibid., s. 143.

71. Ibid., s. 81.

72. 44 & 45 Vic. No. 237. The provisions of Part III on safety and prevention of accidents applied to all British ships registered at, or being at any place within, the colony.

73. S. 175. By s. 184, foreign ships which were unseaworthy could also be detained.

not free from uncertainty. If, by reason of a ship's unseaworthiness, injuries were caused to a passenger or crew member, would this fact alone be regarded as sufficient to render the shipowner guilty? When would a master be held as "knowingly taking" an unseaworthy ship to sea? Would the knowledge of the owner or a crew member be imputed to the master?

Moreover, the glaring shortcomings of the safety provisions are exemplified by three cases. In Rogers v. Loutit,<sup>74</sup> a seaman sued the master and part-owner for personal injuries sustained due to defects in the ropes. The action failed because the court was not satisfied by the evidence that the defendant was aware of the defects in the rope or that his attention had been called to that fact. The court held that, based on the decision in Couch v. Steele,<sup>75</sup> there was no warranty of seaworthiness. It is submitted that, if section 174 had been in force when the accident occurred, the shipowner and possibly his agent would have been convicted of an offence, unless they were able to invoke the proviso.

In Staples v. Stephens,<sup>76</sup> a barge came into Port Adelaide with the disc submerged. The master was charged with "allowing his ship to be so loaded as to submerge in salt water the centre of the disc" in breach of section 194 of the Marine Board and Navigation Act 1881. However, the court held that the offence contemplated by the Act applied to the loading at the port where cargo was put on board, and not when she arrived at the port of discharge. The narrow construction put on the words shows how court decisions could fall out of line with legislative policy.

Following the precedent set by some of the other States, the Marine Act 1936-75 (S.A.) has, in a number of respects, upgraded the law relating to safety. It takes cognizance of and gives effect to modern shipping technology as one way of achieving its objectives. There was, however, one setback in enforcing observance of its provisions. It is submitted that the law enforcement officers and the Minister could

74. (1881) S.A.L.R. 4. Apparently, this case was decided before the Marine Board and Navigation Act 1881 (S.A.) was passed.

75. 3 E. and B. 402.

76. (1883) S.A.L.R. 131.

be subject to unlimited liability for the improper or unlawful exercise of their powers under the Act.<sup>77</sup> Unless this problem was removed, it would seriously weaken legislative efforts to deal with the hazards created by unseaworthy ships. Limited immunity is conferred under section 8 of the Marine Act Amendment Act 1976 (S.A.).<sup>78</sup> It reads:

"No civil liability attaches to the Minister or any other person acting in the administration of this Act, in respect of any certificate, permit or other instrument issued under this Act."

It does not provide protection against the consequences of unlawful acts of officers and/or the Minister which are not connected with certificates, e.g. the wrongful detention of a ship.<sup>79</sup>

#### 6. Western Australia

For almost eight decades after the settlement, legislative activity in this area was geared mainly to pilotage and maritime traffic in the colony's harbour.<sup>80</sup>

The use of coastal vessels and large steamships as the common mode of conveying passengers and settlers in the late nineteenth century highlighted gaps in the colony's law relating to navigation. The Navigation Act 1904 (W.A.)<sup>81</sup> alleviated the public concern for the safe carriage of passengers by sea.<sup>82</sup> In place of the traditional marine board, the Chief Harbour Master was charged with the responsibility of achieving the objects of the Act. Several forms of statutory control to ensure the safety of life at sea were implemented.

By section 70, where a British ship's unseaworthiness was such as to endanger human life, she could be detained.<sup>83</sup> The investigations,

77. See e.g. Marine Act 1936-75 (S.A.), s. 35. As to cancellation or refusal to issue certificates relating to ship's equipments, etc., see s. 78.

78. No. 55 of 1976, adding a new section 145 to the principal Act.

79. Marine Act 1936-75 (S.A.), s. 35 confers on the Minister or any officer of the Department of Marine and Harbour powers of detention of unsafe ships in Australian waters.

80. E.g. the Shipping and Pilotage Consolidation Ordinance 1855 (18 Vic. No. 15) (W.A.) together with the amendments has been repealed and replaced by the Shipping and Pilotage Act (No. 17 of 1967) (W.A.).

81. No. 59 of 1904.

82. See Parts IV and VI.

83. Navigation Act 1904, s. 70. By the Navigation Act Amendment Act (No. 33 of 1926) (W.A.), s. 10, the word "steamship" in the Navigation Act 1904 (except in s. 43) was replaced by "ship".

which followed, would include a survey of the ship and an ascertainment as to her crew sufficiency. Unfortunately, this method of stamping out the use of unsafe vessels was undermined by the fear of liability for wrongful detention. Where a ship was detained "without reasonable and probable cause," the loss or damage recoverable under section 73 (1) would embrace the cost of or incidental to the detention and survey of the ship.<sup>84</sup> The extension of the detention provisions to foreign vessels under section 77 demonstrated the colony's firm policy to get rid of all unsafe vessels which were a threat to life.

The compulsory marking of deck and load lines was introduced as a related aspect of seaworthiness. This requirement applied to all British ships except those expressly exempted under section 81.

In one respect, Western Australia was ahead of the other States. Nowhere in any of the other State legislation can one find rules that were more comprehensive than those in the Second Schedule to the 1904 Act (W.A.). They prescribed in detail the life-saving appliances to be carried by different classes of British ships used for carrying passengers. The clear-cut classification spelt out the range of equipments and other requirements appropriate to each category of ships. The rules also applied to foreign-going vessels - sailing ships and steamships included. They were given a wide scope of operation by the incorporation of certain provisions of the Imperial Merchant Shipping Act 1894.<sup>85</sup> To avoid repugnancy, the Governor's power was restricted by section 78 (2) to promulgating rules which were similar to their English counterparts. For contravention of the rules, the shipowner or the master, who was proved to be at fault, would be fined and the ship detained.<sup>86</sup>

84. The shipowner would be able to recover compensation against the government for wrongful detention of the ship under the Crown Suits Act, 1898 (62 Vic. No. 9) (W.A.).

85. Navigation Act 1904, Second Schedule Division (A) Class 1, Division (B) Class 1 and Class 2. etc.

86. Ibid., s. 79 and s. 80 (3).

Like the legislation of the other States, the 1904 Act (W.A.) was inadequate in one important respect. It did not provide for the payment of compensation where passengers lost their lives or were injured as a result of non-observance of the rules by shipowners or the ship's master. Moreover, in the absence of an invalidating provision in the Act, shipowners would attempt to exonerate themselves from all liability by inserting exemption clauses in contracts of carriage of passengers.

In line with the policies of other States, the Western Australian Marine Act 1948<sup>87</sup> has translated into reality the twofold concept, namely, the safety aspects of navigation and the prevention of accidents. As a new measure to deal with the problems posed by collisions, observance of the collision regulations by all coast-trade,<sup>88</sup> harbour and river ships within the State's jurisdiction was rendered obligatory.<sup>89</sup> With regard to the presumption for non-observance, of the collision regulations and the master's duties after a collision, the Act merely follows the pattern set by the other States. The underlying philosophy of the legislature is oriented towards the enhancement of trade and the protection of property as well as human lives.

Two further measures to promote safety at sea are noteworthy. Under the Western Australian Marine Act Amendment Act 1965,<sup>90</sup> the role of the Harbour and Light Department was extended. Where a vessel after being boarded by an authorised person is found to be unseaworthy or in an unsafe position or locality, it may be ordered to the nearest port or some other place.<sup>91</sup> This provision enables

87. No. 72 of 1948. The body charged with the administration of the Act is the Harbour and Light Department: ss. 8 (1) and 9.

88. The expression "coast-trade ship" in the 1948-1972 Act (W.A.), s. 8 (1) was amended by the Western Australian Marine Act Amendment Act 1966 (No. 69), s. 4 to include a "limited coast-trade" except in Part III of the 1948 Act.

89. Ibid., ss. 89 and 90. The collision regulations are appended to the Second Schedule.

90. No. 25 of 1965.

91. Ibid., s. 195 A (2), as amended by the Western Australian Marine Act Amendment Act, s. 2; also ibid., s. 206 A as amended by Western Australian Marine Act Amendment Act (No. 67 of 1977), s. 13.

the Department's officers to stop and, at random, inspect vessels anywhere within the State's jurisdiction. A new approach to safety requirements was introduced by the Western Australian Marine Act 1973. The Manning Committee set up under this Act is charged with the responsibility of determining the minimum qualifications, experience and complement of crew required to ensure the ship's safe navigation and the safe use of its equipments and machinery. Its functions include reviewing and varying any determinations previously made.<sup>92</sup> The impact of its work on the smaller vessels will result in the formulation of new guidelines. No coast-trade, harbour or river ships can proceed to sea or be navigated within the State waters, unless the Committee's determination made with respect to the vessel is complied with.<sup>93</sup>

#### IV. CONCLUSION

In terms of the rights, remedies and protection of seamen and ships' masters, the laws in the six Australian States, as the end product of a long legislative process, are similar. The favoured treatment was part of the Imperial policy to encourage British subjects to work as seamen in Britain's merchant fleet.<sup>94</sup> In the early days, it was mandatory for British ships to be manned almost exclusively by British subjects.<sup>95</sup>

The similarity between the State laws and the Imperial law on

92. Ibid., s. 21 C, as amended by the Western Australian Marine Act Amendment Act. (No. 2) (No. 109 of 1973), s. 6.

93. Ibid., s 21 D, as amended.

94. See e.g. 1835 (Imp.) (5 & 6 Will IV, c. 24), "An Act for the Encouragement of the voluntary Enlistment of Seamen...;" 1845 Act (Imp.) (8 & 9 Vic., c. 87), "An Act for the Encouragement of British Shipping and Navigation." See also Chapter Four.

95. See Chapter One.

the subject is largely the result of pre-conceived planning by the Imperial legislators. This fact is evident from section 109 of the Merchant Shipping Act 1854 (Imp.), section 261 of the Merchant Shipping Act 1894 (Imp.) and the other provisions. Australian State laws do not differentiate between the rights, remedies and protection of ships' masters and seamen engaged in inter-State trade and those of their counterparts engaged in foreign trade.

The dangers of navigation to life and property increased dramatically with the volume of maritime traffic. Clearly the success of colonial and Empire-wide shipping as the major mode of cargo and passenger transportation depended on reducing the risks to an acceptable level. In the early stages, Imperial legislation provided a solution to the problems in a piecemeal fashion. Part IV of the Merchant Shipping Act 1854 (Imp.) was concerned with the promotion of safety and the prevention of accidents. It was expressed to "apply to all British ships." Following the progressive example of the Imperial legislation,<sup>96</sup> colonial legislatures gave effect to the internationally-accepted rules of sailing. Like Britain, the Australian colonies dealt with the hazards of navigation by implementing a manifold approach. This includes the adoption of the international collision regulations,<sup>97</sup> the marking of deck and load lines, the stipulation of stringent requirements as to seaworthiness, and the imposition of the duty of mutual assistance after a collision.<sup>98</sup> Western Australia is the only State that has provided special procedures based on current technology to promote safety in navigation.<sup>99</sup>

96. As to the adoption and application of the international collision regulations by Britain up to the present time, see R.H.B. Sturt, The Collision Regulations (1984), Lloyd's of Lond. Press Ltd., Lond., pp. 1-3.

97. The statutory presumption of fault for non-observance of such regulations has been abolished by the Navigation Act 1912-73 (Comth.), s. 263 (1), and under British law by the Maritime Conventions Act 1911 (Imp.) (1 & 2, Geo. V, c. 57), s. 4.

98. For position under the Navigation Act 1912-73 (Comth.), see s. 265.

99. See the Western Australian Marine Act Amendment Act (No. 2) (No. 109 of 1973), s. 6.



The body of maritime law principles in each of the Australian colonies was built up in a number of ways. Most of the pre-1854 enactments passed as part of the laws for the peace, welfare and good government of the colonies were of a varied nature.<sup>1</sup> Their operation was of a limited duration. More permanent in character and effect than a number of the early "indigenous" enactments were those English laws which were imported into Australia and administered under the Australian Courts Act 1828 (Imp.).<sup>2</sup> The incorporation of English case principles in, and the extension of the Imperial legislation by, later colonial enactments had significantly fostered the development of Australian laws.

We have reserved for treatment in the next chapter the grounds on which colonial and State laws may be struck down as invalid.

1. I.e., in the exercise of powers by colonial legislatures under the respective constitutions. See the beginning of this chapter.
2. 9 Geo. IV., c. 83.

## CHAPTER THREE

### VALIDITY OF COLONIAL, STATE AND COMMONWEALTH LEGISLATION

#### I. INTRODUCTION

It has been observed that the Australian Courts Act 1828 (Imp.) distinguished between common law and statute law.<sup>1</sup> The axiom applied by courts is that Imperial statutes which were not imported at the time when the 1828 Act came into force would be inapplicable at a later date or stage.<sup>2</sup> Under section 24, whenever doubts existed, the Governors with the advice of the Legislative Councils were empowered to declare what laws and statutes were applicable. Discretion was also given to establish "such limitations and modifications of any such laws and statutes...as may be deemed necessary."<sup>3</sup>

The growth of Britain's Empire necessitated the extension of her laws to her overseas settlements and colonies and the formulation of a uniform code of maritime law. With this policy in view, the Imperial Parliament passed the Merchant Shipping Act 1854 (Imp.) which consolidated the provisions of a number of Acts. By reason of the application of numerous provisions of this Act to Her Majesty's Dominions, a foundation was laid for the establishment throughout the Empire of a common system of maritime law.<sup>4</sup> The Merchant Shipping Act 1894 (Imp.), with broader aims and perspectives than its predecessor, implemented further the Imperial doctrine. By Imperial legislation, the underlying philosophy and concepts of English maritime law were made an integral part of colonial jurisprudence.

The object of this chapter is threefold. First, consideration is given to the mechanisms which streamlined colonial laws and also imposed stringent requirements to be met before any departure from

1. See chapter One.

2. Ex parte Nicholas (1839) 1 Legge 123, p. 138, per Stephen J.

3. Australian Courts Act 1828 (Imp.), s. 24. It was pointed out that this Act was of a general constitutional character: The Commonwealth v. The Limerick Steamship Co. Ltd. (1929) 35 C.L.R. 69, p. 103, per Isaacs and Rich, J.J.

4. We saw also how colonial legislatures extended to their territories the operation of various provisions of Imperial Acts.

the Imperial legislation could be validly made. Second, as an analytical study, we shall look closely at instances of conflict between colonial and Imperial legislation and also between State and Commonwealth legislation. Third, it is proposed to examine the measures designed to remove doubts as to the validity of certain laws, and the legal difficulties which had arisen.

## II. EFFECTS OF COLONIAL ENACTMENTS

### 1. Pre-1900 Colonial Legislation

One of the recurring problems concerned the competence of colonial legislatures. It was closely related to the validity of colonial enactments on maritime matters. Often the issue could only be resolved by expensive litigation, sometimes by time-consuming appeals to the Privy Council.

In a number of ways the Merchant Shipping Act 1854 (Imp.) had crucial effects on colonial legislation. It was expressed in broad terms to cover many different aspects of shipping. Certain matters were, however, left out of its scope. They included shipping and navigation in the harbours, rivers, canals and ports of colonies, the establishment of marine boards and the enactment of rules for instituting proceedings in the local courts.<sup>5</sup> It appears that colonial legislation dealing with such matters was valid.<sup>6</sup> Moreover, colonial legislation passed after the 1828 Act (Imp.) which gave effect to the provisions of the 1854 Act (Imp.) would not be affected unless they were subsequently amended. What was the situation where a local

5. In the Australasian Steam Navigation Co. v. Smith & Others [1885-6] 7 N.S.W.R. 207, at p. 239, Windeyer, J., was of the opinion that collision regulations enacted under the Imperial Merchant Shipping Acts, 1854-1873, "might not apply" to vessels navigating "harbours, ports or places." A similar view was expressed by Barwick, C.J., in China Ocean Shipping Co. and Others v. State of South Australia [1979-80] 27 A.L.R. 1, p. 11.

6. Ibid., p. 239, Windeyer, J., was also of the opinion that the Navigation Act 1871 (N.S.W.) (35 Vic. No. 7), s. 89 was invalid as it was repugnant to the Imperial Merchant Shipping Act Amendment Act 1873, s. 17. But s. 89 "will still be operative" with regard to vessels navigating "harbours, ports or places" referred to in s. 120 of the colonial Act of 1871. This case is a good example of the attitude of judges not to construe repugnancy more widely than was necessary.

Act, which had been in force prior to the 1854 Act (Imp.), was found to be inconsistent with some provision of that Act or with the subsequent amendments? The local legislation would be construed subject to Imperial legislation. Thus local Acts, which were in conflict with Imperial enactments, would be rendered null and void to the extent of their inconsistency with the latter.<sup>7</sup> For four decades after the 1854 Act was passed, colonial shipping legislation had been thrown into a state of uncertainty and discredit. It is true that section 547 had provided an answer to the problems peculiar to the colonies. For certain reasons, few of the post-1854 colonial Acts passed can strictly be regarded as the valid exercise of the new power given to alter the Act in its application to the colonies.<sup>8</sup> To come within the ambit of that section, the colonial Act had "to be confirmed by Her Majesty in Council." This was a prerequisite for the repeal, whether wholly or in part, of the provisions of the Imperial Act relating to ships registered in the British possession. Furthermore, the colonial Act would not be operative until the approval was proclaimed in the colony, or "until such time thereafter as may be fixed by such Act...for the purpose." Meeting the conditions laid down in section 547 is essential to the validity of all such colonial enactments.<sup>9</sup> Obviously the confirmation would only be given after the bills had been reserved for the signification of Her Majesty's pleasure. It appears that assent ordinarily given by a Governor to the bills is insufficient.

Section 736 of the Merchant Shipping Act 1894 (Imp.) has re-enacted section 4 of the Merchant Shipping (Colonial) Act 1869 (Imp.).<sup>10</sup>

7. Colonial Laws Validity Act 1865 (Imp.), s. 2.
8. Subject to the conditions being met, s. 547 empowered certain changes to be made with respect to the law applicable to the colony. But it did not ensure the validity of the pre-1854 colonial legislation.
9. This section has been re-enacted as Merchant Shipping Act 1894 (Imp.), s. 735.
10. 32 & 33 Vic., c. 11.

It empowers colonial legislatures to regulate coasting trade. Colonial enactments for such purposes will only be operative where the conditions laid down are satisfied. They include the following, *viz.* the presence of a suspending clause in the bills, the public signification of Her Majesty's pleasure in the British possession and the equal treatment under the proposed enactments of all British ships in the possession.

The dubious validity of many of the colonial enactments, whether passed before or after the 1854 Act (Imp.), undermined the foundations of colonial maritime trade. Moreover, there were genuine fears that some of the decisions given, including penalties imposed, based on the application of colonial enactments were invalid. It was fortunate for all concerned that their validity was subsequently confirmed. The preamble to the Colonial Acts Confirmation Act 1894 (Imp.)<sup>11</sup> referred to two categories of colonial legislation.<sup>12</sup> The Act was stated to apply to the colonies of New South Wales, Victoria, Tasmania, South Australia, Queensland and Western Australia.

Section 2 remedied the defects as follows:

"Any Act passed by the legislature of a colony to which this Act applies, and assented to in Her Majesty's name by the Governor of such colony, and not disallowed by Her Majesty before the passing of this Act, shall be deemed to be and to have been, as from the date of such assent, as valid as if the same had been reserved for the signification of Her Majesty's pleasure, and Her Majesty's assent to the Act had been duly given and signified in the colony at the date aforesaid."

Subject to the requirements of the section being met, colonial enactments passed on or prior to 20th February, 1894,<sup>13</sup> were deemed to be valid. Its relatively wide wording suggests that colonial enactments which failed to meet the requirements of sections 735 and 736 of the 1894 Act (Imp.) would be validated.

In Chapter Two, we saw how various provisions in Part II of the Merchant Shipping Act 1894 (Imp.) relating to masters and seamen were imported by various State enactments. By sections 260 and 261, Part II was expressed to apply to ships registered in the United Kingdom and to British ships registered elsewhere. It follows that by "paramount force" most of the provisions in Part II would extend

11. 56 & 57 Vic., c. 72.

12. The doubts and difficulties relating to both these categories were removed by s. 2.

13. Operative date of the Act (56 & 57 Vic., c. 72).

to the Australian colonies, and later States, as part of their laws. The object of the local enactments was to take public cognizance of such Imperial provisions so as to make the position beyond doubt. Section 261 was subject to a proviso in paragraph (d). The provisions in Part II were inapplicable where the "ship is within the jurisdiction of the government of the British possession in which the ship is registered." This small hiatus was filled when those provisions were extended by local enactments to the States. Uniformity in the law was thus ensured. It has been established that the territorial boundary of a State is along the low-water mark.<sup>14</sup> The laws relating to masters and seamen passed by each State Parliament for the good government of the State should be valid within its territorial waters.

An alternative basis for supporting the validity of the gap-filling legislation was provided by section 264 of the 1894 Act (Imp.). It empowered the legislature of a British possession to apply or adapt to any British ships registered at, or being in, any of its ports and to the owners, masters and crews of those ships the provisions in Part II. Naturally, it was limited to those provisions which did not apply by "paramount force." The effect of the section was to render the gap-filling legislation operative "in the same manner as if it were enacted in this Act."

A further ground may be advanced. It appears that most of the Imperial provisions dealing with the rights and remedies of masters and seamen merely put together in statutory form the case law. This body of principles had over the years been administered by Australian courts as part of State laws.<sup>15</sup> It is arguable that, in

14. New South Wales v. The Commonwealth (1976) 50 A.L.J.R. 218, p. 219, view being held by five of the seven Judges.

15. See Chapter One. It is submitted that the views expressed by B.A. Helmore as to the invalidity of the various State enactments on seamen are not tenable: B.A. Helmore, "Validity of State Navigation Acts" (1953) 27 A.L.J. 16. The reason is that the State enactments - as we have seen - generally reproduced Imperial legislation on the subject. Where intra-State trade was carried on outside State waters, by the Merchant Shipping Act 1894 (Imp.), ss. 260 and 261, the provisions in Part II would apply by paramount force.

extending the operation of those Imperial provisions, Australian State Parliaments were doing no more than consolidating the principles which already formed part of their legal systems.

For the reasons given, it is unlikely for any of the State enactments relating to masters and seamen to be held invalid for non-compliance with section 735 or 736 of the 1894 Act (Imp.).

One vital issue concerns colonial legislation which was operative, or deemed to be operative, in repealing certain provisions of the 1854 Act (Imp.). This Act and the amending legislation were in turn amended and consolidated by the Merchant Shipping Act 1894 (Imp.).<sup>16</sup> What is the effect of such colonial legislation relating to ships registered in the colony on the provisions of the 1894 Act (Imp.)? If a colonial Act was valid, or deemed to be valid, under the pre-1894 legislation, would it be valid under the 1894 Act? The answer is found in the saving provisions of section 735 (2) as follows:

"Where any Act or Ordinance of the legislature of a British possession has repealed in whole or in part as respects that possession any provision of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act."

## 2. Imperial Policy

From the viewpoint of the British Commonwealth of Nations as a whole, the subject of merchant shipping was mainly governed by the Merchant Shipping Act 1894 (Imp.). In considering the legislation of the Australian colonies and later States, Australian shipping must be seen "not as a separate integer but as a component part of the Imperial integer."<sup>17</sup>

Britain's underlying policy in relation to her colonies as embodied in the 1854 Act (Imp.), steadily reinforced by the amending legislation, was extended in large measure by the 1894 Act (Imp.). The repeal of the pre-1894 Acts (Imp.) would not render inoperative

16. This Act has been amended by a series of other Acts, including the Merchant Shipping Acts (1970 c. 36) (U.K.) and (1979 c. 39) (U.K.).

17. Union Steamship Co. of New Zealand Ltd. v. The Commonwealth (1925) C.L.R. 130, p. 148, per Isaacs, J.

the statutes which the colonial legislatures had been authorised by such Acts to pass. It seems certain that the pre-1894 colonial legislation would continue to operate unless it is inconsistent with the provisions of the 1894 Act (Imp.). Moreover, colonial legislation had not in every case been held invalid on the ground of the lack of total conformity to certain provisions of the 1894 Act (Imp.). A good example is found in the Western Australian case of Rex v. Mason and Another.<sup>18</sup> An inquiry was held under the Inquiries into Wrecks Ordinance 1864 (W.A.),<sup>19</sup> as amended. Certain charges of misconduct brought against Captain Landgren were proved. In consequence, the tribunal constituted under the Ordinance ordered that his master's certificate be suspended. The local legislation and the tribunal constituted thereunder were within the express authority of the Merchant Shipping Act 1854 (Imp.), as amended. Subsequently, the 1854 Act (Imp.) together with the amendments was repealed by the 1894 Act (Imp.). Section 478 of this Act confers wider powers on the colonial legislatures than section 242 (5) of the repealed 1854 Act (Imp.). However, section 478 makes no mention of colonial statutes passed previously but refers to future statutes to be enacted by the colonies. Landgren sought to quash the order suspending his master's certificate by relying on two major grounds. Firstly, as the 1854 Act (Imp.) on which the Inquiries into Wrecks Ordinance 1864 (W.A.) was based had been repealed, the Ordinance and its amendments were no longer operative. He alleged that the tribunal constituted under the Ordinance (W.A.) had ceased to exist, and therefore had no jurisdiction in the matter. Secondly, reliance was placed on section 478 of the 1894 Act (Imp.). It was said to have shown the British Parliament's intention to repeal those provisions of the 1854 Act (Imp.), as amended, in so far as they empowered local legislatures to pass Acts constituting a tribunal to enquire into wrecks or casualties. In rejecting the above arguments, the Chief Justice said:<sup>20</sup>

"Although the Acts of 1854, 1862 and 1882 have been repealed, they have been repealed for the purposes of

18. (1904) 6 W.A.R. 134.

19. 28 Vic. No. 2.

20. (1904) 6 W.A.R., pp. 138-139.



rearrangement, and their provisions have been re-enacted in substance in the consolidation Act of 1894, and there has been no moment at which the substance of the old enactment has ceased to be in force...I think it is clear that, this being a consolidation Act, the intention of section 478 was not only to keep alive the authority previously vested in the local Legislatures of British Possessions...."

Apart from reasons of expediency, the intention of the Imperial Parliament, as correctly inferred by the judges from the consolidating Act of 1894, seems to be an overriding factor in the decision. It may be seen as part of Britain's Empire-building policy.<sup>21</sup>

An earlier case relating to this concept is In re Victorian Steam Navigation Board, Ex parte Allan.<sup>22</sup> The steamship "Gulf of Finland" struck a rock off Cape Jaffa in the colony of South Australia. The Victorian Steam Navigation Board established by the Passengers, Harbours and Navigation Statute 1865 (Vic.)<sup>23</sup> found the master guilty of default in not observing the sailing directions. His master's certificate, which had been issued by the Board of Trade in England, was suspended for three months. His application for a certiorari to quash the proceedings was heard by the Full Court of the Supreme Court of Victoria.

Section 242 (5) of the Merchant Shipping Act 1854 (Imp.) empowered the legislature of a British possession to set up a tribunal to hold inquiries into charges of incompetency or misconduct on the part of masters or mates of ships. Moreover, section 23 (1) of the Merchant Shipping Act Amendment Act 1862 (Imp.)<sup>24</sup> read:

"The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act conferred on the Board of Trade, shall...vest in and be exercised by the local marine board...or tribunal by which the case is investigated or tried...."

21. Ibid., p. 141. McMillan J. found in the consolidating Act such a real intention of Imperial Legislature to keep alive the courts already constituted in the colonies that he avoided applying the literal interpretation. The purpose was to avoid the absurd consequences which would otherwise arise.

22. (1881) 7 V.L.R. 248.

23. 28 Vic. No. 255.

24. 25 & 26 Vic., c. 63.

Section 77 of the Passengers, Harbours and Navigation Statute 1865 (Vic.) was intended to confer a wide jurisdiction on the Victorian Steam Navigation Board. The first part of that section empowered the Board to carry out the provisions of Part IV of the statute in Victoria. The second part referred to the Board as being constituted to exercise "all such powers" as were conferred by section 242 of the 1854 Act (Imp.) and section 23 of the Merchant Shipping Act Amendment Act 1862 (Imp.). It is arguable that a literal interpretation of section 77 supports the dissenting view of Higinbotham, J. He expressed a strong view that section 77 did not impose any "local or geographical limits whatever" on the Board, and that in section 23 of the 1862 Act (Imp.) there was also no limitation of the extent of the local jurisdiction of the Board.<sup>25</sup> Two of the three judges allowed the applicant's summons for the prohibition. The two judges construed section 77 and considered the jurisdiction of the Board in the light of the policy of Imperial legislation. Stephen, J., said:<sup>26</sup>

"The English Legislature, carrying out the policy to give one jurisdiction over the Empire, has endeavoured as far as it could, to place departmental as well as judicial control over the certificates in the hands of local tribunals but [the] local Legislatures cannot interfere with those certificates."

Section 77 of the 1865 statute and indeed any local Acts purporting to deal with certificates granted by the Board of Trade in England were subject to important limitations. Stawell, C.J., held that the Imperial Acts did not confer extra-territorial jurisdiction on the local tribunal and that the 1865 statute (Vic.) did not attempt to confer such jurisdiction. Otherwise it would have been in violation of the powers conferred on the constitution of the colony. Really, this approach served to save the statute from being declared ultra vires. It was further held that the local statute only applied to locally-issued certificates.

The confinement of the jurisdiction of a local tribunal to cases which arose in the waters of a colonial territory was found to give rise to grave inconvenience. In the English Hansard for 1882,<sup>27</sup>

25. (1881) 7 V.L.R., pp. 255-257.

26. Ibid., p. 265.

27. P.D., vol. 272 (3rd. ser.), col. 416.

the above decision was reported as the primary cause of the new legislation. The Merchant Shipping (Colonial Inquiries) Act 1882 (Imp.)<sup>28</sup> was passed to empower colonial tribunals to hold inquiries into charges of incompetence or misconduct and shipping casualties in certain cases occurring outside the limits of the colony. This situation furnishes a classic example of a narrow Imperial policy being extended to promote safety in navigation for the benefit of the Empire.

Another development involving a further relaxing of the policy is found in section 478 (1) of the Merchant Shipping Act 1894 (Imp.). Under this provision, the "legislative authority in any British possession" is empowered to invest a colonial tribunal with extra-territorial jurisdiction in respect of shipwrecks or other casualties occurring abroad.<sup>29</sup>

### 3. Procedure

It is not uncommon to find colonial legislation which differed from the Imperial Act with respect to procedural matters. Unless there were departures in important matters, e.g. rules of sailing or safety, courts would generally be reluctant to curtail or strike down the local legislation. In Ex parte Setterfield,<sup>30</sup> the ship, s.s. Brighton, under the charge of Setterfield, collided with the ship, s.s. Brunner. Based on the investigation held, the Court of Marine Inquiry found that the collision was due to the failure of the masters of the two ships to observe the collision regulations closely. There was further default on the part of Setterfield in that he failed to keep a proper lookout. As the ship's mate, he and the captain of the other ship were asked "to show cause why their certificates should not be suspended." Setterfield's certificate was ordered to be suspended for twelve months. He applied to the Full Court for a prohibition to restrain the Marine Court of Inquiry from acting on the suspension order. To support the contention that the Marine Court of Inquiry

28. 45 & 46 Vic., c. 76.

29. See The King v. Turner; Ex parte the Marine Board of Hobart (1927) 39 C.L.R. 411, p. 430, per Isaacs.

30. (1900) 17 W.N. 174.

had no such authority, two grounds were advanced. Firstly, by section 10 of the Navigation (Amendment) Act 1899 (N.S.W.)<sup>31</sup> the Marine Court of Inquiry should exercise the power of suspending certificates in the same manner as a court carrying out a similar inquiry in England. Secondly, by section 470 of the Merchant Shipping Act 1894 (Imp.) it could not suspend a certificate "unless a copy of the report or a statement of the case" had been served on the applicant. The application was not granted on the ground that the 1899 Act (N.S.W.) neither provided for any tribunal to hold a preliminary inquiry nor required any report or statement of the case to be made to the applicant. The point of importance for our purpose is that the three judges unanimously upheld the validity of the 1899 Act (N.S.W.) and the suspension order made thereunder. It is submitted that colonial enactments, though not similar to Imperial legislation, would seldom be impugned as invalid if in the light of the local conditions the differences were considered necessary. In a limited sense, the decision sought to reduce the Imperial restraint. It appears that the jurisdiction of the colonial legislatures was not confined to cases involving locally-issued certificates where the collisions occurred within their territorial waters.

#### 4. Collision Regulations

As a politic principle, the Imperial Parliament had never contemplated allowing colonial legislatures to interfere with the basic rules of sailing and navigation. The reasons were well stated by Windeyer, J., in Australasian Steam Navigation Co. v. Smith and Others. He said:<sup>32</sup>

"The safety of England's vast mercantile marine and of the lives of thousands largely depends upon the existence of a universal code of rules of uncontradicted and undoubted authority over every British subject that sails the seas."

Near Newcastle, the Birksgate, a steamer belonging to the plaintiffs, collided with the Barrabool, a steamer belonging to the defendants. Both vessels were seriously damaged. Evidence showed that at the time of the collision, which occurred at midnight, the Birksgate was

31. No. 32 of 1899.

32. The Australasian Steam Navigation Co. v. Smith and Others (1885-6) 7 N.S.W.R. 207, p. 237.

on the wrong side of the harbour. Section 120 of the Navigation Act 1871 (N.S.W.)<sup>33</sup> enacted the starboard rule, and imposed a penalty "not exceeding £5" on the master for non-compliance. Section 98 read:

"If in any case of collision it appears to the Court before whom the case is tried, that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault unless ...."

The section was identical in its terms with section 29 of the Merchant Shipping Amendment Act 1862 (Imp.)<sup>34</sup> which was repealed by section 33 of the Merchant Shipping Act 1873 (Imp.)<sup>35</sup>. Section 17 of the latter Act provided:

"If in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be at fault, unless...."

The major issue before the court was whether the provisions of the local Act or those of the Imperial Acts would apply to the case. By section 291 of the Merchant Shipping Act 1854 (Imp.), Part IV of the Act was applicable to British ships throughout the world. Section 2 of the Merchant Shipping Act 1873 (Imp.) provided that this Act was to be construed as one with the 1854 Act (Imp.). Effect was given to section 2 of the Colonial Laws Validity Act 1865 (Imp.). The Full Court of the Supreme Court of New South Wales held that, in so far as there was any repugnancy, sections 98 and 120 of the 1871 Act (N.S.W.) were to be read subject to section 17 of the Imperial Act. Windeyer, J., said:<sup>36</sup>

"Just as it is impossible to suppose that the Imperial Legislature ever contemplated allowing a colonial Legislature power to establish regulations for the safety of life and property conflicting with the Imperial regulations,

33. 35 Vic. No. 7.

34. 25 & 26 Vic. c. 63.

35. 36 & 37 Vic., c. 85.

36. (1885-6) 7 N.S.W.R., p. 239.

so it is impossible to suppose that the Imperial Legislatures would allow the authoritative and coercive power of its regulations of universal application to be affected by colonial legislation imposing different responsibilities upon persons offending against them."

The judgment of Windeyer, J., also highlighted the paramountcy of Imperial laws. Where a colonial Act was merely a re-enactment of an Imperial statute, the local judge trying the case would be administering Imperial and colonial laws. What was the effect of those regulations enacted under a colonial Act, which was in identical terms with an Imperial Act, in their application to the vessels and mariners within the scope of the Imperial statute? Apparently such colonial regulations would declare that the colonial legislatures had expressly recognized them. The object was to bring them prominently to the notice of local shipowners and mariners. But if the Imperial statute did not extend to them, they would then become subject to the local enactment.<sup>37</sup>

The reasoning in the above decision was followed three decades later in Coal Cliff Collieries Ltd. v. The Saros; Hazelwood Steamship Co. Ltd. v. The Saros.<sup>38</sup> Two vessels, namely, the Herga and the Saros, were involved in a collision at Sydney Heads. One of the questions raised was whether the Herga was at fault in respect of any act or omission on her part prior to the collision. It was found that the Herga, as the overtaken vessel, had committed a breach of the collision regulations in not keeping her course. Section 117 of the Navigation Act 1901 (N.S.W.)<sup>39</sup> corresponded to section 98 of the old Navigation Act 1871 (N.S.W.). Subject to the proviso, section 117 provided that where a collision was occasioned by the non-observance of the collision regulation, the ship guilty of such breach would be deemed to be at fault. On the other hand, if section 419 (4) of the Imperial Merchant Shipping Act 1894 applied, the statutory presumption of fault against the Herga for non-observance of the regulations would arise. The court held that section 419 (4) continued to apply to New South Wales. Firstly, the Maritime

37. Ibid., p. 238.

38. (1915) 33 W.N. (N.S.W.) 3. The Arklow, 9 A.C. 136 was followed.

39. No. 60 of 1901.

Conventions Act 1911 (U.K.),<sup>40</sup> which repealed section 419 (4) did not extend to the Australian State. Secondly, although section 263 of the Navigation Act 1912 (Comth.) nullified the statutory presumption of fault, which would otherwise arise under the Imperial Act, it was not in force. No proclamation had been issued, as required by section I of the Navigation Act 1912 (Comth.), to bring it into operation. Street, J., felt bound to follow the decision in Australasian Steam Navigation Co. v. Smith and Others<sup>41</sup> and also applied section 2 of the Colonial Laws Validity Act 1865 (Imp.). Accordingly, section 117 of the Navigation Act 1901 (N.S.W.) was read subject to section 419 (4) of the Imperial Act. The result was that the Herga was held liable. Since it was not established that her change of course could not possibly have contributed to the accident, the proviso to section 419 (4) could not be raised in defence.

The above approach was the result of the narrow construction put by the courts on the powers of the colonial legislatures conferred by the Imperial legislation. Windeyer, J., stated the Imperial strategy as follows:<sup>42</sup>

"The Merchant Shipping Act of 1854, by section 547... is not an authority to alter as far as colonial registered ships are concerned any of the provisions of the Act, but only to alter the provisions of the Act which relate to ships registered in such possession. The provisions of the Act relating to ships registered in the colony are those made applicable specially to ships registered in any British possession by the last part of section 109 of the Act, which, taken in conjunction with section 288 of the Act, clearly shows that the Imperial Legislature only contemplated a colonial legislature dealing with the provisions of the Act contained in part 3, which is concerned exclusively with the hiring and employment of masters and seamen."

##### 5. Wider Powers

Section 547 of the 1854 Act (Imp.) was, with minor modification,

40. 1 & 2 Geo. V, c. 57, s. 4 (1).

41. (1885-6) 7 N.S.W.R. 207, supra.

42. Ibid., p. 236.

re-enacted as section 735 (1) of the Merchant Shipping Act 1894 (Imp.). The narrow view continued to persist for almost twenty-six years after the establishment of the Commonwealth of Australia! In Hume v. Palmer,<sup>43</sup> three of the five High Court Judges,<sup>44</sup> probably for the first time, gave section 735 of the Merchant Shipping Act 1894 a much wider scope. This historic decision is a bold judicial move to free the Commonwealth from some of the Imperial restraints of the past. The effect of the decision is that, by section 735, the legislature of a British possession may, in large measure, alter or repeal the provisions of the 1894 Act, including regulations made there-under,<sup>45</sup> relating to ships registered in the possession. As the Commonwealth was at that date regarded as a British possession,<sup>46</sup> the powers exercisable under section 735 would apply throughout Australia and to ships registered in each of the States. The wide interpretation given to the section is much in the favour of the States as well. Since the decision, the Legislatures of the States, which are also regarded as British possessions,<sup>47</sup> have enjoyed greater freedom and confidence in initiating legislation to promote their shipping trade.

Owing to the binding authority of the High Court decision, State Supreme Courts are bound to uphold the validity of local legislation more extensively than before. This approach has been

43. (1926) 38 C.L.R. 441.

44. They are Knox, C.J., ibid. p. 449; Isaacs J., p. 452; and Starke J., p. 462.

45. Ibid., p. 462, where Starke J. referred to the collision regulations enacted under s. 418 of the 1894 Act (Imp.).

46. The Imperial Interpretation Act 1889 (52 & 53 Vic., c. 63) s. 18 (2) defines "British possession" to "mean any part of Her Majesty's dominions ...and where parts of such dominions are under both a central and local legislature, all parts under the central legislature...." The Australian States, the Northern Territory and the A.C.T. are deemed to constitute a single British possession to which ss. 735 and 736 of the 1894 Act (Imp.) applied. In John Sharp & Sons Ltd. v. The Katherine Mackall (1924) 34 C.L.R. 420, the Commonwealth has been held as a British possession within the two sections.

47. See McKelvey v. Meagher (1906) 4 C.L.R. 265, pp. 285 and 286; and also McArthur v. Williams (1936) 55 C.L.R. 324, p. 342. In R. v. Commissioner for Transport; Ex parte Cobb & Co. Ltd. [1963] Qd. R. 547, the Full Court having considered the Interpretation Act 1889 (Imp.) held that Queensland is a British possession within the terms of s. 736.



highlighted by the reasoning of the three judges of the Full Court of the Supreme Court of New South Wales in Butler and Another v. The Ship.<sup>48</sup> The "Palmerston", belonging to the plaintiffs, and the "Millimumul", belonging to the defendants, were involved in a collision off the coast of New South Wales. It was alleged that the misleading display of the trawling lights by the "Palmerston" had caused the collision. Maxwell, A.J., held that the "Millimumul" was alone to blame as the collision was due to her fault. The defendants appealed against the decision, alleging that both vessels were to blame. Two of the grounds raised were as follows. Firstly, both were "coast-trade vessels" within the meaning of the State Navigation Act 1901 (N.S.W.). Secondly, the presumption of liability set out in section 419 (4) of the 1894 Act (Imp.) applied. As a result of the views expressed by the judges of the High Court in Hume v. Palmer,<sup>49</sup> the three Judges of the Full Court rightly considered the decisions of Windeyer, J.<sup>50</sup> and Street, J.,<sup>51</sup> to have been overruled.<sup>52</sup> As the Navigation Act 1901 (N.S.W.) had received the Royal approval, as required, it was held to be a valid exercise of the power of repeal or alteration conferred by section 735. The 1901 Act (N.S.W.) therefore applied to all locally-registered ships. The appellants could not rely on the repealed section 419 (4) of the 1894 Act (Imp.) as being in force with regard to New South Wales ships. Section 117 of the 1901 Act (N.S.W.) was construed as it stood. As there was no evidence that the collision had been occasioned by failure of the "Palmerston" to observe the regulations made under the 1901 Act (N.S.W.), the appeal failed.

48. (1930) 47 W.N. (N.S.W.) 66.

49. (1926) 38 C.L.R. 441, supra.

50. Australasian Steam Navigation Co. v. Smith and Others (1885-6) 7 N.S.W.R. 207, supra.

51. Coal Cliff Collieries Ltd. v. The Saros; Hazelwood Steamship Co. Ltd. v. The Saros (1915) 33 W.N. (N.S.W.) 3.

52. Accordingly, both the above Supreme Court of New South Wales decisions were not followed in Butler and Another v. The Ship (1930) 47 W.N. (N.S.W.) 66, supra.

The High Court decision in Hume v. Palmer<sup>53</sup> represents a landmark in the development of Australian maritime law. Its significance lies in the position of the High Court of Australia which, for all practical purposes, is the final Court of Appeal.<sup>54</sup>

### III. COASTING TRADE

#### 1. Meaning

Section 736 of the Merchant Shipping Act 1894 (Imp.)<sup>55</sup> confers powers on the legislatures of British possessions to regulate coasting trade. The section is the authority on which the bulk of the present-day State enactments depend for their validity. Unfortunately, the expression "coasting trade" is not defined in any of the Imperial merchant shipping legislation. Dr. Lushington was credited with giving a logical explanation of what is not coasting trade. In The Agricola,<sup>56</sup> the ship returned from Calcutta to London and discharged all her cargo there. The ship then proceeded from London to Liverpool in ballast. It was held that the ship, while prosecuting the voyage from London to Liverpool, was not employed on a coasting voyage. The reason was that, in the ordinary course of her trade, she was engaged in trading from Rio Janeiro and Calcutta to London and Liverpool. In The Lloyds,<sup>57</sup> the ship was ordinarily engaged in foreign trade. At the time in question, in the course of a voyage, she carried a cargo from Liverpool to London. Because the ship was ordinarily engaged in foreign trade, it was held that the ship was not employed in coasting trade. The two decisions and the principle

53. (1926) 38 C.L.R. 441.

54. In Kirmani v. Captain Cook Cruises Pty. Ltd.; Green, Third Party (No. 2) (1985) 59 A.L.J. 480, the High Court unanimously refused to grant an application under s. 74 of the Commonwealth Constitution for a certificate to appeal to the Privy Council.

55. It re-enacts the provision first introduced by the Merchant Shipping (Colonial) Act 1869 (Imp.), (32 & 33 Vic. c. 11), s. 4.

56. (1843) 2 Wm. Rob. 10. The words "coasting trade" in the Imperial legislation were construed in this and other cases for the purpose of determining whether the ship concerned would be exempted from pilotage. See also Davidson v. Mekiben (1821) 3 B. & B. 112.

57. (1863) 32 L.J. P & A. 197. Dr. Lushington delivered the judgment based on the principle he had formulated in The Agricola. Lord Alverstone, C.J., applied the same principle in Phillips (app.) v. Born (resp.) (1906) 93 L.T. 634.

laid down by Dr. Lushington were consistently followed in The Wine-  
stead.<sup>58</sup> Bruce, J., explained:<sup>59</sup>

"I think that the words 'ships employed in the coasting trade'...means employed for the time, at least, only in the coasting trade, and not in foreign trade."

To come within the expression, a ship must principally or habitually and regularly be engaged in the coasting trade of the United Kingdom.

The meaning given by English judges must be applied in construing the words "coasting trade of that British possession" in section 736. According to case authorities and statute law, the term "British possession" includes an Australian State and also the Commonwealth before she became a Dominion in 1942.<sup>60</sup> The Parliament of the Commonwealth, while as a British possession and subject to the conditions laid down in section 736, was empowered to enact legislation to regulate coasting trade. Since the Commonwealth embraces the State of Tasmania and a number of islands separated by sea, the legislation she was competent to pass would extend to inter-State trade throughout Australia. In the case of a State, however, her seaward boundary is formed by the low-water mark. It is submitted that in respect of a State her coasting trade will involve maritime commerce and carriage of goods in extraterritorial waters.<sup>61</sup> It

58. [1895] P. 170.

59. Ibid., pp. 173-174. The Winestead was held not to be exempted from the compulsory employment of the pilot. This was consequent upon the finding that she was not employed in the coasting trade; see Merchant Shipping Act 1854 (Imp.), ss. 376 and 379.

60. See para. 11 of the Schedule to the Statute of Westminster Adoption Act 1942 (Comth.); the Interpretation Act 1889 (U.K.), (52 & 53 Vic., c. 63), s. 18 (2). John Sharp & Sons Ltd. v. The Katherine Mackall (1924) 34 C.L.R. 420, supra, where Australia was held to be a British possession. The interpretation has been approved in McIlwraith McEacharn Ltd. v. The Shell Company of Australia (1945) 70 C.L.R. 175, p. 192, per Latham, C.J.

61. R.D. Lumb, The Constitutions of the Australian States (4th ed. 1976), op. cit., p. 83, footnote 14: "Moreover the Imperial Parliament can confer power of an extraterritorial nature. It has in fact done so with regard to coasting trade in the Merchant Shipping Act (1894)." See also B.A. Helmore "Validity of State Navigation Acts" (1953) 27 A.L.J., p. 17.

appears that a ship could be engaged in the coasting trade of a State, or of Australia, if she habitually and regularly plied between the ports of a State, or between the ports of Australia, respectively. There is no reason to hold that State legislation will be rendered inapplicable to a "coasting trade" ship of a State simply because she occasionally traverses part of the course ordinarily used by foreign-going or inter-State ships.<sup>62</sup>

The above reasoning is borne out in a general way by the decision in China Ocean Shipping Co. and Others v. State of South Australia.<sup>63</sup> A port installation in South Australia was damaged by a ship. Under section 124 (1) of the Harbors Act 1936-1974 (S.A.), absolute liability was imposed on the shipowner and the agent. One of the issues raised was whether the Harbors Act (S.A.) was rendered invalid by section 736 of the 1894 Act (Imp.). The High Court upheld the validity of the Harbors Act (S.A.). Barwick, C.J., went one step further. He held that the Harbors Act (S.A.) did not "relate to the coasting trade of South Australia."<sup>64</sup> It provides some authority for the view that State legislation dealing with ports, harbours and navigation on State rivers is not concerned with coasting trade. Such legislation is therefore outside the scope of section 736.

The term "coasting trade" is used in a somewhat broad sense in the Navigation Act 1912-1973 (Comth.).<sup>65</sup> Section 7 (1) reads:

"A ship will be deemed to be engaged in the coasting trade, within the meaning of this Act, if she takes on board passengers or cargo at any port in a State, or a Territory, to be carried to...or delivered at, any other port in the same State or Territory or in any other State or other such Territory...."

62. That a State legislature has such powers is decided in The King v. Turner; Ex parte Marine Board of Hobart (1927) 39 C.L.R. 412; Newcastle and Hunter River Steamship Co. v. Attorney-General for the Commonwealth (1921) 29 C.L.R. 357, *infra*.

63. (1979-80) 27 A.L.R. 1.

64. *Ibid.*, p. 11.

65. The purpose of this wide definition is related to the federal system of licensing of coastal trade ships; see s. 288 (1).

The provision appears to cover both types of coasting trade—namely intra-State and inter-State. The latter is within the powers of the Commonwealth Parliament, while the former comes within the province of a State Parliament.<sup>66</sup> As will be seen shortly, the overlap of State and Commonwealth legislative powers is a perpetual source of conflict between State and Commonwealth legislation. Moreover, it is not easy for judges to draw a clear line of demarcation between State and Commonwealth coasting trade.

## 2. Conformity to Conditions

The special conditions to be met by State legislatures under section 736 of the 1894 Act (Imp.) have been noted. Moreover, the Colonial Acts Confirmation Act 1894 (Imp.) did not extend to colonial enactments passed after 20th February, 1894.

Non-compliance with those conditions can give rise to consequences far more devastating than they were originally supposed. In R v. Commissioner for Transport; Ex parte Cobb & Co. Ltd.,<sup>67</sup> the prosecutors (i.e. Cobb & Co. Ltd.) had obtained orders nisi against the Commissioner for Transport. He was required to show cause why writs of prohibition should not be issued to restrain him from giving effect to section 43 of the State Transport Act 1960 (Qld.).<sup>68</sup> That section provided for the cancellation and suspension of permits concerning vehicles on roads. Under different parts the Act dealt with road services, water transport and air transport. The prosecutors contended that the Act was invalid on two grounds. Firstly, contrary to the requirement of section 736 of the Merchant Shipping Act 1894 (Imp.), the 1960 Act (Qld.) contained no suspending clause. Secondly, Her Majesty had not publicly signified her pleasure thereon. The Full Court of the Supreme Court of Queensland accepted the arguments. Part VIII of the Act (Qld.) dealing with the coasting

66. A full discussion of the relevant sections of the Commonwealth of Australia Constitution Act 1900 (Imp.) and the case authorities will follow in due course.

67. [1963] Qd. R. 547.

68. 9 Eliz. II No. 48.

trade of Queensland was not severable from the rest of the Act. The whole Act was held to be inoperative and invalid. Thus the prosecutors were entitled to the relief they claimed. Soon after the High Court of Australia had granted special leave to appeal against the decision, the Transport Laws Validation Act 1962 (Qld.)<sup>69</sup> was passed. In short, it has a twofold objective. It carves out and includes in the Schedule the provisions dealing with matters of road and air transport. The "excepted sections", which concern water transport or "coasting trade" within section 736 of the Merchant Shipping Act 1894 (Imp.) are placed in the third column of the Schedule. The Transport Laws Validation Act 1962 (Qld.) expressly validates the first category rendering them operative with retrospectivity. The High Court rescinded the special leave to appeal. In delivering the judgment of a strong Court, Dixon, C.J., said (*inter alia*):<sup>70</sup>

"[T]hat Act [i.e. the Transport Laws Validation Act 1962] validates the Act [i.e. State Transport Act 1960] which the Supreme Court had thought was invalid, by reason of certain sections, and in that validation those sections are excepted. There can be no doubt that the validation was complete, is retrospective, and...operates upon the rights of the parties in the present case."

Another consequence of invalidity due to non-compliance is highlighted in the Privy Council case of Western Transport Pty. Ltd. v. Kropp.<sup>71</sup> Two transport companies (W.T. and M.T.) were the appellants in the actions brought against the Queensland State Government (Q.S.G.). W.T. had over a period of about three years paid Q.S.G. a total of £449,238 6s. 10d. in respect of a licence and a goods permit. M.T. had also paid Q.S.G. the sum of £138,579 14s. 6d. for a similar licence. The licences were issued under the State Transport Facilities Acts, 1946<sup>72</sup> to 1959 (Qld.), which were amended and consolidated by the State Transport Act 1960 (Qld.). The goods permit was issued under the State Transport Act 1960 (Qld.). The State Transport Facilities Acts,

69. 11 Eliz. II No. 24.

70. Kropp v. Cobb & Co. Ltd. (1962) 36 A.L.J.R., p. 205. This view was approved by the Privy Council in Western Transport Pty. Ltd. v. Kropp (1964) 38 A.L.J.R. 237, p. 241.

71. (1964) 38 A.L.J.R. 237.

72. 11 Geo. VI No. 17.

1946 to 1959 (Qld.), provided for the regulation and control of the carriage of goods within the State "by road, by air, and by water." We have seen the State Transport Act 1960 (Qld.), in different parts, dealt with transport by road, water and air. W.T. and M.T. were road transport contractors. They claimed that they had, involuntarily and under compulsion, paid the two sums of money to Q.S.G. Their claims were for the recovery of the money. They alleged that the State Transport Facilities Acts, 1946 to 1959 (Qld.), and the State Transport Act 1960 (Qld.) were invalid. The basis of their claims was founded upon an examination of parts of the Acts not concerned with road transport but with water transport. They contended that those parts of the Acts relating to water transport were invalid because of non-compliance with section 736 of the Merchant Shipping Act 1894 (Imp.). Thus the defect brought about the result that the whole of the provisions of the Acts, including the provisions on road carriage, were invalid! Because of the Transport Laws Validity Act 1962 (Qld.) which - as we have seen - was given retrospective effect, the Privy Council dismissed the appeals brought by W.T. and M.T.

The last two cases illustrate the prohibitive nature of the conditions imposed by section 736 of the Merchant Shipping Act 1894 (Imp.) on Australian State Parliaments. One obvious proposition may be drawn from the judgments. Unless the requirements of section 736 are met, no State Parliament is competent to enact laws relating to marine transport in any form if it comes within the scope of coasting trade. It is immaterial whether the provisions in question take up the entire Act or are included among the sections which deal with non-shipping matters. Short of meeting the requirements, validation legislation, however widely-worded, does not alter the status of invalid provisions on coasting trade.<sup>73</sup> Moreover, it is clear that a State Act on coasting trade, which contains the

73. It should be noted that the Transport Laws Validity Act 1962 (Qld.) only operated to validate legislation with respect to road, rail and air transport. The provisions concerning water or marine transport were outside its scope.

"suspending clause", can only be validly amended by an Act containing a similar clause. What is the position if an Act containing the suspending clause is passed to amend a principal Act which does not have the clause? It is doubtful whether a principal Act, as amended, will operate with retrospective effect even though such intention is expressly stated in the amending Act.<sup>74</sup>

### 3. An Analysis of the Status of State Legislation

So far we have dealt with the meaning of coasting trade in terms of geographical limits and the scope of the voyages undertaken. Coasting trade includes the carriage of goods by sea, the management of ships, the seaworthiness requirements, the manning of ships by sufficient qualified personnel and also navigation, e.g. observance of collision regulations and safety measures. It is submitted that each State Parliament is competent to pass legislation to regulate shipping and navigation solely within its territorial waters.<sup>75</sup>

We shall consider the validity of a number of State Acts, which, inter alia, deal with coasting trade. It is immaterial whether such trade is carried on between ports in the same State or in different States.

New South Wales. The Navigation Act 1901 (N.S.W.)<sup>76</sup> is the current principal Act. By Section 3, a "coast trade" ship is defined as a registered British ship engaged in trading or going between two ports within the jurisdiction of New South Wales. The expression includes a registered steam tug.

It has been seen that, in Butler and Another v. The Ship,<sup>77</sup>

74. It is a pertinent question whether the wording of s. 736 will empower the legislatures of British possessions to render operative, with retrospective effect, enactments which initially failed to satisfy the conditions laid down.

75. Examples are State enactments regulating shipping trade and navigation in harbours, ports, rivers and canals within State jurisdiction.

76. No. 60 of 1901.

77. (1930) 47 W.N. (N.S.W.) 66.



the Full Court of the Supreme Court of New South Wales unanimously upheld the validity of the Navigation Act 1901. For the purpose of section 735 of the 1894 Act (Imp.), the Act (N.S.W.) was held to be a valid exercise of the power of repeal or alteration of Imperial legislation. The decision should, however, be confined to the facts of the case.<sup>78</sup>

Though the areas covered by sections 735 and 736 of the Merchant Shipping Act 1894 (Imp.) may overlap in some way, the two sections deal with different aspects of shipping. The conditions laid down for the exercise of the powers conferred also differ. Meeting the conditions for the purpose of section 735 does not empower the State Parliament to enact laws to regulate coasting trade for the purpose of section 736. With just two exceptions,<sup>79</sup> all the other amending Acts of New South Wales contain no suspending clause. Such Acts which have received the Royal approval are effective under section 735 in changing the Imperial law. But they are incapable of validating those provisions of the 1901 Act (N.S.W.) which apply to coasting trade. The Navigation (Amendment) Act 1908 (N.S.W.) is the only Act with the suspending clause. It provides that sections 5 to 10 "should not come into operation until her Majesty's

78. There are a number of reported cases where persons affected by colonial or state legislation had not challenged its validity. In Bruce v. Moore, Ex parte Moore (1911) St. R. Qd. 57, A's conviction of an offence under a certain regulation enacted under the Navigation Act 1876 (Qld.) (41 Vic. No. 3) was quashed. There was no evidence that the services of a licensed pilot were available. In H. Smith Industries Ltd. v. Melbourne Harbour Trust Commissioners [1970] V.R. 406, it was held that by the Marine Act 1958 (No. 6302) (Vic.), s. 132 a tug going astern without giving a signal was deemed to be at fault. In re Medley (1902) 28 V.L.R. 475, on appeal to the Full Court of the Supreme Court, the conviction of the master for breach of the Marine Act 1890 (54 Vic. No. 1165) (Vic.), s. 183 was quashed. The reason was that the particular offence charged was not stated.

79. I.e. The Navigation (Amendment) Act 1908 (N.S.W.), and the Commercial Vessels Act (N.S.W.) (No. 41 of 1979), s. 16 of which amends certain provisions of the Navigation Act 1901 (N.S.W.).

pleasure thereon has been publicly signified...." It is submitted that, except those provisions which may be validated under section 735, the remaining provisions of the 1901 Act (N.S.W.) on coasting trade are invalid.<sup>80</sup>

The Commercial Vessels Act 1979 (N.S.W.)<sup>81</sup> not only contains the suspending clause, but was also reserved for and given the Royal approval. It is therefore a valid exercise by the State Parliament of the powers conferred by both sections 735 and 736.

Queensland. The Navigation Act 1876 (Qld.)<sup>82</sup> was reserved for Her Majesty's Assent which was proclaimed on 20th July, 1877. Despite any non-compliance with section 547 of the Merchant Shipping Act 1854 (Imp.), the Queensland Act would be rendered operative by reason of the Imperial Colonial Acts Confirmation Acts 1894.<sup>83</sup> The Navigation Acts, 1876 to 1930 (Qld.), were amended by the Navigation Amendment Act 1939 (Qld.).<sup>84</sup> We apply the unanimous decision of the Full Court of the Supreme Court of New South Wales in Butler and Another v. The Ship.<sup>85</sup> Accordingly, it is submitted that, since the Royal approval had been granted in each case, the amending Acts were operative under section 735 of the Merchant Shipping Act 1894 (Imp.).

The consolidating enactment currently in force is the Queensland Marine Act 1958.<sup>86</sup> This principal Act and the Queensland Marine Act Amendment Acts of 1963,<sup>87</sup> 1967,<sup>88</sup> 1972,<sup>89</sup> 1975<sup>90</sup> and 1979<sup>91</sup> contain

80. Similarly, the Sea-Carriage of Goods (State) Act, (No. 10 of 1921) (N.S.W.) would be invalid in relation to coasting trade.

81. No. 41 of 1979.

82. 41 Vic. No. 3.

83. 56 & 57 Vic..c. 72, supra.

84. 3 Geo. VI No. 26.

85. (1930) 47 W.N. (N.S.W.) 66.

86. 7 Eliz. II No. 37.

87. No. 1 of 1963.

88. No. 1 of 1967.

89. No. 1 of 1972.

90. No. 48 of 1975.

91. No. 9 of 1979.

the suspending clause and were given Royal approval. There is no doubt as regards their validity under section 735 and 736 of the Imperial Act.

Queensland is one of the three States that have their own legislation regulating the transport of goods by water. Section 3 of the Sea-Carriage of Goods (State) Act 1930<sup>92</sup> provides that the rules scheduled to the Act shall apply to "the carriage of goods by sea in ships carrying goods from any port in the State of Queensland to any other port in the said State." However, the absence of the suspending clause, as required by section 736, will render the Act invalid in its application to coasting trade.

Victoria. The current principal enactment is the Marine Act 1958.<sup>93</sup> It consolidates the law relating to passengers, harbours and navigation. Virtually all the Victorian enactments, including the amending Acts, suffer the common defect of non-compliance<sup>94</sup> with the requirements of sections 735 and 736. Apart from the absence of the suspending clause, and in place of the Royal assent, the proclamation of the Governor in Council is stated as the means of bringing the enactments into force. Some of the matters covered by the 1958 Act (Vic.), which fall outside the scope of section 736, may nevertheless be within the competence of the Victorian Parliament. However, if those matters cannot be severed from the rest of the Act, the whole Act is void. This consequence is seen in the decision of the Full Court of the Supreme Court of Queensland in R v. Commissioner for Transport; Ex parte Cobb & Co. Ltd.<sup>95</sup>

South Australia. This State provides a classic example of close adherence to the Imperial legislative requirements. At the time when

92. 21 Geo. V No. 18.

93. No. 6302 of 1958.

94. In each case s. 1 provides that the Act or the provisions thereof will come into operation by proclamation of the Governor in Council published in Government Gazette. See e.g. Acts, No. 8293 of 1972, No. 8723 of 1975 and No. 9342 of 1979.

95. [1963] Qd. R. 547.

the Merchant Shipping Act 1894 (Imp.) was enacted the principal Act in force was the Marine Board and Navigation Act 1881 (S.A.).<sup>96</sup> The amending Acts, 1906<sup>97</sup> and 1924<sup>98</sup>, passed in the State after 1894 contained the suspending clause and, having been reserved, received the Royal assent which was proclaimed. Similarly, the Marine Act 1936 (S.A.),<sup>99</sup> the principal Act consolidating the law, and the Marine Act 1936-1975 (S.A.) incorporating the amendments, meet the requirements of sections 735 and 736. The South Australian legislation along with Marine Act Amendment Act 1976 (S.A.)<sup>1</sup> is valid statute law.

Western Australia. The Navigation Act 1904 (W.A.),<sup>2</sup> including the amending Acts of 1907<sup>3</sup> and 1920,<sup>4</sup> adopted a rather different form of wording to give effect to the enactments. They were stated to be enacted by "the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia...." The date of assent, presumably from His Majesty, was in each case expressly stated. Following the decision of the Full Court of the Supreme Court of New South Wales,<sup>5</sup> it is submitted that the Acts were an effective exercise of the

96. 44 & 45 Vic. No. 237.

97. 6 Edw. VII No. 917.

98. 15 Geo. V No. 1661.

99. No. 2337 of 1936-7.

1. No. 55 of 1976. S. 2 provides for the Act to come into operation on a day to be fixed by proclamation and also contains the suspending clause as required by s. 736 of the 1894 Act (Imp.).

2. 4 Edw. VII No. 59.

3. 7 Edw. VII No. 9.

4. 11 Geo. V No. 27.

5. Butler and Another v. The Ship (1930) 47 W.N. (N.S.W.) 66.

power under section 735 of the 1894 Act (Imp.).

The Western Australian Marine Act 1948<sup>6</sup> is the current principal enactment. It retains the same form of wording as its predecessors. In addition, it contains the suspending clause and received the Royal approval, which was proclaimed in the State. There is no doubt about the validity of this Act. Unfortunately the numerous amendments to the Act do not conform to the requirements of sections 735 and 736. Consequently, unless they can stand on their own, or the valid provisions are severable from the inoperative ones, they are totally invalid. The reason is that they are ultra vires the powers of the State Parliament. Like Queensland and New South Wales, this State chose to regulate by a separate Act the transport of goods by sea between ports within its territory. For non-conformity to the requirements of section 736, the Sea-Carriage of Goods Act 1909 (W.A.)<sup>7</sup> will only be operative in relation to contracts of carriage within the ports and harbours of the State only.

Tasmania. The enactments passed during the twenty-five years after the 1894 Act (Imp.) related to marine boards, harbour trusts and a wide range of other shipping matters, including pilotage, which came within their respective jurisdictions. Most of the provisions, together with those concerned with coasting trade, were later consolidated by the Marine Act 1921 (Tas.).<sup>8</sup> This Act was assented to by the Governor, but had no suspending clause and was not reserved. Of the fourteen amendments to the Act passed between 1960 and 1974,<sup>9</sup> only the Marine Act 1963 (Tas.)<sup>10</sup> conformed to the requirements of section 735 and 736. The Marine Act 1976 (Tas.),<sup>11</sup> which is the

6. 12 & 13 Geo. VI No. 72.

7. 9 Edw. VII No. 26.

8. 12 Geo. V No. 60.

9. For a list of such enactments, see Marine Act 1976 (No. 18), Schedule V.

10. No. 97 of 1963.

11. No. 18 of 1976.

consolidating Act, deals, inter alia, with navigation in Tasmanian waters and other related matters. The Act and all the amendments that follow<sup>12</sup> carry the suspending clause and also received the Royal assent. In an unprecedented move, the Act seeks to validate a list of fifteen Acts which come within the scope of sections 735 and 736 of the 1894 Act (Imp.). Section 197 reads:

"Subject to this Act and in so far as it may be necessary to ensure the validity and operation of every Act set out in Schedule VI, every such Act is validated as from its enactment and declared and deemed to be and from such enactment to have been good and valid law subject only to any amendment or repeal of any such Act by another Act (including this Act)."

The fifteen Acts repealed in Schedule I are included in Schedule VI. Section 197 is clearly intended to place beyond doubt the validity of the acts or functions purportedly carried out by the marine boards according to any of the Acts.

#### 4. Some Observations on the Scope of Sections 735 and 736

The analysis shows that, to a large degree, the enactments of Queensland, South Australia and Tasmania have met the Imperial legislative stipulations. In the main, the enactments of the other States suffer the defect of invalidity. There are two alternative ways of dealing with the embarrassing situation. A more tedious and painstaking approach is for each of the States concerned to identify carefully all its legislation which deals with coasting trade or which falls within section 736. The State Parliament can then enact a validation Act which conforms to the requirements of the Imperial Act. Under the validation Act, the inoperative legislation is declared to be valid and effective, subject to any amendments made. Obviously, the more easy way out is to follow the example set by Tasmania.<sup>13</sup> To be effective, the consolidating Act should not only

12. I.e. the Marine Act (Tas.) (No. 125 of 1977); Marine Acts (Tas.) (Nos. 19 and 38 of 1978); Marine Amendment Act (Tas.) (No. 36 of 1980); Marine Amendment Act (Tas.) (No. 8 of 1981).

13. If the purpose of the Act is to validate with retrospective effect certain legislation, it is questionable whether section 736 confers on State Parliament the power. See also the method used by South Australian Parliament in Marine Act Amendment Act (S.A.) (No. 62 of 1968), s. 4.

meet all the requirements of the Imperial Act but also contain the provisions of sections 2 (1) and 197, including an appropriate schedule.<sup>14</sup>

It is clear that sections 735 and 736 have enabled each State to enact its legislation which may not necessarily be in harmony with that of its neighbour. Where marked differences exist in the legislation of two or more adjacent States, the smooth flow of inter-State coastal trade may be seriously disrupted. The problems have long been recognized. Since 1971, the Department of Transport officers have been working with State marine officials to produce a uniform code of shipping standards for commercial vessels.<sup>15</sup> The object of the scheme could only be realized if the States individually legislate to give statutory effect to the code. However, it was felt that the proposed scheme could not be implemented unless the restrictions imposed by the Imperial Parliament were removed by amending sections 735 and 736. The fears are well-founded if the proposed code deals with matters which fall outside the scope permitted by those sections. One example is the implementation of shipping standards which differ from those laid down by Imperial legislation.

On the other hand, those two sections do not operate to preclude a State Parliament from enacting harbour legislation. In China Ocean Shipping Co. v. State of South Australia,<sup>16</sup> the question arose whether the Harbors Act 1936 (S.A.) was repugnant to the Merchant Shipping Act 1894 (Imp.). Sections 503 and 504 of the latter enable

14. See Marine Act (Tas.) (No. 18 of 1976).

15. The project was undertaken by the Association of Australian Port and Marine Authorities. The understanding was that the Commonwealth and each of the States would give statutory effect to the code in respect of the vessels it controls: Report on Australian Maritime Legislation (June 1976), A.G.P.S., Canberra, p. 22.

16. (1979-80) 27 A.L.R. 1.

a negligent party involved in a collision to apply to the court to limit his liability. Under the Harbors Act (S.A.), the liability of the owner and the agent of the ship is absolute, while the liability of the master is based on his negligence. With respect to the scope of sections 735 and 736, Barwick, C.J., said: <sup>17</sup>

"The Harbors Act is neither a statute confirmed by the Crown in Council nor did it relate to coasting trade of South Australia. In any case, the Harbors Act does not purport to repeal, amend or in any sense to supersede the provisions of Pt. VIII of the Act of 1894 or of that of 1900...In my opinion, the two statutes can stand together...Claims founded on the provisions of the Harbors Act will be circumscribed by ss. 503 and 504...."

Similarly, the Parliament of a State is competent to pass legislation to regulate shipping trade within its ports, canals and rivers.

#### IV. CONFLICT BETWEEN STATE AND COMMONWEALTH LAWS

##### 1. Commonwealth Laws prior to adoption of Statute of Westminster 1931 (Imp.).

It is necessary to trace the historical development of this part of the Commonwealth legislation. Until the adoption of the Statute of Westminster 1931 (Imp.), the Commonwealth though having a Dominion status was no more than a self-governing colony.<sup>18</sup> The "Merchant Shipping Act, 1894 was not a law which in its application to Australia the Parliament of the Commonwealth could affect. Nor could that Parliament make a law inconsistent with it."<sup>19</sup> The paramountcy of the Imperial legislation was ensured by the Colonial Laws Validity Act 1865 (Imp.).<sup>20</sup> It is nowhere provided in the Commonwealth of Australia Constitution Act 1900 (Imp.) that sections 735 and 736 of the Imperial Act 1894 would cease to apply to the Commonwealth

17. Ibid., 27 A.L.R., p. 11.

18. Ibid., 27 A.L.R. 1, p. 8, per Barwick, C.J.

19. Asiatic Steam Navigation Co. Ltd. v. Commonwealth of Australia (1956) 30 A.L.J. 159, p. 162, per Dixon, C.J., McTiernan and Williams, J J.

20. See R.D. Lumb and K.W. Ryan, The Constitution of the Commonwealth of Australia (2nd ed. 1977), pp. 190 and 344.



after its formation. Hence before the adoption of the Statute of Westminster 1931 (Imp.), the powers of the Commonwealth Parliament to make laws on merchant shipping and coasting trade were limited by sections 735 and 736. Although the Navigation Act 1912 (Comth.) was confirmed by His Majesty in Council, it contained no suspending clause and had not been reserved for His Majesty's pleasure as required by section 736. The result - as we have seen - is that the provisions on coasting trade or possibly, where such provisions were not severable, the entire Act itself would be void.<sup>21</sup> Moreover, it is arguable that, in a conflict between State and Commonwealth laws on the subject, the problem was not to be resolved merely by the application of section 109 of the Commonwealth Constitution. The requirements of section 736 would also apply to determine the status of both State and Commonwealth laws.

An important High Court of Australia decision, which shows that Commonwealth statutes were no more than colonial legislation and therefore operated on par with State enactments, is that in Union Steamship Co. of New Zealand v. The Commonwealth.<sup>22</sup> The master of a British ship registered in the United Kingdom requested J, the superintendent of the Mercantile Marine Office in Sydney, to carry out certain statutory duties. According to the provisions of the Merchant Shipping Acts, 1894 to 1906 (Imp.), discharge of the crew of the ship and engagement of a new crew had to be effected in J's presence. J refused to allow the discharge and engagements unless all the conditions, including the payment of fees imposed by the Navigation Act 1912-1920 (Comth.) and the regulations made thereunder, were met. The shipowner, as plaintiff, paid the fees under protest. This action was brought to recover the fees paid and to challenge the validity of the Commonwealth legislation.

21. This point has been covered in the preceding pages. But see R.D. Lumb, The Constitution of the Australian States (4th ed. 1976), op. cit., p. 93.

22. Prior to the passing of the historic Statute of Westminster Adoption Act 1942 (Comth.), neither "the Merchant Shipping Act nor any other Imperial Act then in existence either widened or narrowed the scope of the Constitution Act:" Union Steamship Co. of New Zealand Ltd. and Another v. The Commonwealth and Another (1925) 36 C.L.R. 130, p. 151, per Isaacs, J.

Judgment was given for the plaintiff. The High Court held that the Navigation Act 1912-1920 (Comth.) was a colonial law within the meaning and operation of section 2 of the Colonial Laws Validity Act 1865 (Imp.). Consequently, any Commonwealth enactments, including subsidiary legislation, which were repugnant to the provisions of the Merchant Shipping Acts, 1894 to 1906 (Imp.), were to the extent of such repugnancy void and inoperative. Despite the formation of the Commonwealth, the paramountcy of Imperial legislation is seen in the rejection of the argument that the "Constitution Act operates as an implied repeal pro tanto of the Colonial Laws Validity Act and the Merchant Shipping Act 1894." <sup>23</sup>

It was not until the Statute of Westminster Adoption Act 1942 (Comth.) was passed that "doubts as to the validity of certain Commonwealth legislation" were removed. <sup>24</sup> Among the provisions stated in the preamble to operate with retrospective effect are sections 2 and 5 of the Statute of Westminster 1931 (Imp.). Section 2 (1) provides that the Colonial Laws Validity Act 1865 (Imp.) shall not apply to any Commonwealth laws made after the commencement of the Statute of Westminster 1931 (Imp.) by the Parliament of a Dominion. By section 5, sections 735 and 736 of the Merchant Shipping Act (Imp.) shall not apply to the Commonwealth Parliament. The Commonwealth's adoption of the Statute of Westminster 1931 (Imp.) is stated to have effect "as from the commencement of the war between His Majesty the King and Germany." As the retrospectivity does not go back far enough, uncertainty as regards the validity of the Navigation Act 1912 (Comth.) might still remain. No difficulty, however, is encountered in that respect. As we shall see shortly, several of the post-1912 Acts (Comth.), i.e. the 1912-20 Act (Comth.), the 1912-25 Act (Comth.) and the 1912-35 Act (Comth.) had been reserved for His Majesty's pleasure. The Royal Assent was received and duly proclaimed.

23. *Ibid.*, pp. 140-141, per Knox, C.J.

24. Assented to on 9th October, 1942. The Statute of Westminster 1931 was passed by Great Britain to implement the Balfour Declaration: Bonser v. La Maccha (1968-1969) 122 C.L.R. 177, p. 189.

Another far-reaching consequence of the 1942 Act (Comth.) is the effect it has on the Imperial legislation expressed to apply to the Commonwealth, whether before, at the date of, or after, the Act. Enlarged constitutional powers are conferred by section 2 (2) on Australia as a Dominion.<sup>25</sup> An enlightening decision relating to the matter under consideration is Bice v. Cunningham.<sup>26</sup> C, a crew member of the British vessel Fresno City, was charged with deserting the ship, in breach of section 221 (a) of the Merchant Shipping Act 1894 (Imp.). The special magistrate who heard the case held that the section was not effective in South Australia on 13th January, 1961, the date of the alleged offence. The case was brought on appeal to the Supreme Court of South Australia. For the offence of desertion committed by seamen, the Imperial provision and section 100 of the Navigation Act 1958 (Comth.) prescribed different penalties. One question raised was whether section 221 (a) was still effective enactment with respect to that offence. The Commonwealth section 100 imposed a much lighter penalty than its Imperial counterpart. Mayo, J., held that the Imperial provision, though still effective in Australia, had been amended, but not repealed, by the Commonwealth section 100. His comments serve to clarify the position:<sup>27</sup>

"Any law made on the same topic after 9th October, 1942, would not be rendered void and inoperative by the Colonial Laws Validity Act 1865 notwithstanding any such repugnancy. In so far as any law imposed by Imperial statute was part of the law of a Dominion, the Parliament of that Dominion could repeal or amend it."

The decision is welcomed as a landmark in the struggle for greater freedom from Imperial restraints. It vindicates the new legislative competence of the Commonwealth Parliament to initiate and pursue an independent policy in shipping and navigation. The same, however, cannot be said in respect of the State legislatures.<sup>28</sup>

25. Moreover, by s. 4, no Imperial statute passed after the date of the 1942 Act "shall extend, or be deemed to extend, to a Dominion" as part of its law, unless it contains a declaration required by that section.

26. [1961] S.A.S.R. 208.

27. Ibid., p. 211.

28. They are not affected by the Statute of Westminster Adoption Act 1942 (Comth.), being still subject to the Colonial Laws Validity Act 1865 (Imp.) and the Merchant Shipping Act 1894 (Imp.), ss. 735 and 736.

## 2. Sections 51 (i) and 98 of Commonwealth Constitution

Sections 51 (i) and 98 empower the Commonwealth Parliament to enact legislation to regulate trade, navigation and shipping. The scope of the powers conferred is examined in relation to the powers exercisable by State Parliaments.

Narrow View. It is informative to analyse the construction and effect given by High Court Judges to the provisions of the pre-1942 Commonwealth Acts. These Acts (Comth.) related, inter alia, to seamen's compensation, inter-State maritime trade and other shipping matters. It is noteworthy that such Acts depended for their validity on an effective exercise of the powers under the Commonwealth Constitution and/or on meeting the requirements of section 735 or 736 of the 1894 Act (Imp.).

In Australian Steamships Ltd. v. Malcolm,<sup>29</sup> the spouse of a deceased seaman brought an action for compensation under the Seamen's Compensation Act 1911 (Comth.) against the Australian Steamships Ltd. In 1914, the case on appeal was heard by the High Court of Australia. The defence raised was that the Seamen's Compensation Act 1911 (Comth.) was invalid on the ground that it was allegedly ultra vires the powers of the Commonwealth Parliament. Moreover, this 1911 Act (Comth.) did not satisfy any of the requirements of sections 735 and 736 of the 1894 Act (Imp.). Its effect is dependent on a valid exercise of the powers under the Commonwealth Constitution. In declaring the Seamen's Compensation Act 1911 (Comth.) to be valid, Gavan Duffy and Rich, J J., held that section 98 had quite a different operation from section 5 (i). It included "a power to make laws with respect to navigation and shipping as ancillary to such trade and commerce."<sup>30</sup> They continued:

"It (section 98) authorises Parliament to makes laws with respect to shipping and the conduct and the management of ships as instrumentalities of trade and commerce, and to regulate the relations and reciprocal rights and obligations of those conducting the navigation of ships in the course of such commerce both among themselves and in relation to their employers on whose behalf the navigation is conducted."

The scope of section 98, as determined, is considered in relation to

29. (1914) 19 C.L.R. 298. In the District Court, judgment for £500 was given for the plaintiff. The appeal brought by the defendants was dismissed.

30. Ibid., p. 335.

section 51 (i) in the earlier case of The Owners of the S.S. Kalibia v. Alexander Wilson,<sup>31</sup> which came before the High Court of Australia in 1910. One of the two matters raised, on appeal from the Supreme Court of New South Wales, was whether the Seamen's Compensation Act 1909 (Comth.)<sup>32</sup> was valid. Section 4 (1) "provides that the Act applies in relation to the employment of seamen (a) on any ship registered in the Commonwealth when engaged in the coasting trade... (b) on any ship (whether British or foreign) engaged in the coasting trade if the seamen have been shipped under articles of agreement entered into in Australia." In section 4 (1), the term "coasting trade" applied to all trade between Australian ports. Any doubts as to its meaning were removed by section 4 (2). The subject matter of the Act therefore expressly included all coasting trade in Australia, whether intra-State or inter-State. Griffith, C.J., construed section 51 (i) of the Constitution. His view was that the power to make laws with respect to trade and commerce with other countries and among the States did not authorise the Commonwealth Parliament to legislate regarding the internal trade of a State. As to the relationship of sections 98 and 51 (i) he said:<sup>33</sup>

"It is not, and cannot be, contended that sec. 98 of the Constitution, which declares that the power in question extends to navigation and shipping, enlarges the ambit of the power, or does anything more than explain the meaning of the words 'trade and commerce' as applied to matters within that ambit."

The Seamen's Compensation Act 1909 (Comth.) contained both valid and invalid provisions. As they were inseverable, or (as Griffith, C.J., put it) since the Act with the inoperative portions omitted would be substantially different in subject matter from the original,<sup>34</sup> the entire Act was declared invalid.<sup>35</sup> This "severability" test has

31. (1910) 11 C.L.R. 689.

32. No. 29 of 1909. It was not based on an exercise of the power given by the 1894 Act (Imp.), s. 735 or 736.

33. Ibid., p. 697. Cf. the dissenting judgment of Isaacs J., to the effect that s. 98 is "an enlargement of the main power, and is not merely an incidental power": The King v. Turner, Ex parte The Marine Board of Hobart (1927) 39 C.L.R. 411, p. 435.

34. This was the validity test he had suggested in The Boot-makers' case (No. 2) 11 C.L.R. 1, p. 27.

35. See, e.g. (1921) 29 C.L.R., pp. 369-370; see also R v. Commissioner for Transport; Ex parte Cobb & Co. Ltd. [1963] Qd. R. 547, supra.

been applied by judges in a number of cases to determine the validity of statutes.<sup>36</sup>

The Construction given to sections 51 (i) and 98 has been followed by the High Court of Australia in The Newcastle and Hunter River Steamship Co. Ltd. and Others v. The Attorney-General for the Commonwealth and Another.<sup>37</sup> A number of companies and persons, as plaintiffs in the action, sought declarations that many sections of the Navigation Act 1912-1920 (Comth.) and its Schedules and the regulations made under it were invalid. The Bill was reserved by the Governor-General for the signification of his Majesty's pleasure, which is stated to have been received on 14th February, 1921. The validity of sections 14, 43, 135, 136, 288 and 293 and Schedules I and II of the Act (Comth.) and the Navigation (Manning and Accommodation) Regulations 1921 (Comth.) was challenged. In general terms, these provisions and the regulations prescribed certain scales of manning and standards of accommodation for the ships concerned. They also prohibited ships from engaging in coasting trade without a licence, and imposed penalties for contravention. The plaintiffs argued that the Commonwealth Parliament had no power to enact the above provisions and regulations with respect to ships engaged solely in intra-State trade. Also, it was argued that the Commonwealth Parliament could not make it obligatory for owners of such ships to obtain a licence to engage in intra-State trade. In the judgment delivered for the plaintiffs, the High Court gave a narrow interpretation to the powers of the Commonwealth Parliament. It only has specific powers to enact laws relating to inter-State and foreign trade and commerce. The High Court is understood to have formulated a useful test as follows:<sup>38</sup>

36. E.g. in (1921) 29 C.L.R. 359, the Navigation Act 1912-20 (Comth.) was involved; in Western Transport Pty. Ltd. v. Kropp (1964) 38 A.L.J.R. 237, the Transport Laws Validation Act 1962 (Qld.) was involved.

37. (1921) 29 C.L.R. 357. The judgment of Gavan Duffy and Rich, J J., in Australian Steamships Ltd. v. Malcolm (1914) 19 C.L.R. 298, p. 335, was followed here.

38. (1921) 29 C.L.R. p. 368, a unanimous judgment.

"The Constitution does not endow Parliament with a substantive power to deal with navigation and shipping at large. It only empowers it to deal with that subject in so far as it is relevant to inter-State and foreign trade and commerce...the effect of sec. 98 is to include in the power to make laws with respect to trade and commerce a power to make laws with respect to navigation and shipping ancillary or relevant to such trade and commerce."

Clearly, the invalid provisions relating to ships engaged in inter-State trade were so interwoven with the valid provisions as to render all of them invalid. Fortunately for the Commonwealth, this disaster was avoided by reason of section 2 (2) of the Navigation Act 1912-1920 (Comth.). The High Court held that "no provision within the power of Parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with."<sup>39</sup>

An interesting issue concerning the powers conferred by section 51 (i) was raised. In the King v. Turner; Ex parte Marine Board of Hobart,<sup>40</sup> a collision occurred in the Derwent River between two steamships, which were owned and registered in Hobart. The ships were not engaged in inter-State or foreign trade or commerce. Shortly before the collision, the two ships had traversed part of the course ordinarily used by ships engaged in such trade or commerce. The High Court of Australia had to decide whether the Court of Marine Inquiry established by the Navigation Act 1912-1925 (Comth.) had jurisdiction to inquire into the collision. An attempt was made on behalf of the Commonwealth to claim special powers under section 51 (i). It was argued that by section 51 (i) the Commonwealth Parliament was empowered to erect a court with exclusive power to deal with shipping casualties. The establishment of the Marine Court of Inquiry under Part IX of the Navigation Act 1912-1925 (Comth.) was

39. *Ibid.*, pp. 369-370. "Severability" provisions are found in the following State enactments: Western Australian Marine Act 1948, s. 4; Queensland Marine Act 1958, s. 4; Navigation Acts Amendment Act 1939 (Qld.), s. 77; Marine Act 1936-1975 (S.A.), ss. 146-147; and Marine Act 1958 (Vic.), s. 263. As the two principal Acts currently in force, *viz.* Marine Act 1976 (Tas.) and Navigation Act 1901 (N.S.W.) do not contain "severability" provisions, the possibility of their being held invalid cannot therefore be ruled out.

40. (1927) 39 C.L.R. 411.

alleged to be the exercise of the power.<sup>41</sup> The arguments were rejected by five of the Judges who adopted the test formulated in Newcastle and Hunter River Steamship Co. v. Attorney-General for the Commonwealth.<sup>42</sup> The test was applied to restrict the powers of the Commonwealth Parliament in two ways. Firstly, it is powerless to regulate the manning of ships not engaged in inter-State or foreign trade or commerce merely because they venture on the high seas or are in waters used by ships engaged in such trade or commerce. Secondly, it is "not at liberty" to establish a court to deal with a collision involving two vessels not engaged in inter-State or foreign trade or commerce. It is immaterial that at the time of the collision the two vessels were outside the course ordinarily used by ships engaged in such trade or commerce and shortly after the vessels had traversed part of such course. The Navigation Act 1912-25 (Comth.) purported to enable the Court of Marine Inquiry to enquire into a casualty which had no relationship or genuine links with inter-State or foreign trade or commerce. To that extent, the provisions of the Navigation Act 1912-25 (Comth.) were held to be ultra vires the Constitution and therefore void.<sup>43</sup> The constitutional importance of the decision is the "relationship" or "genuine links" test laid down for the validity of Commonwealth legislation in its application to intra-State trade. The fact that this Act (Comth.) had been reserved for Royal Assent which was proclaimed on 13th August, 1925, did not give Commonwealth legislation a wider operation.

A second argument raised on behalf of the Commonwealth sought to rely on the wider powers allegedly conferred by the Merchant Shipping Act 1894 (Imp.) It was contended that section 478 had

41. Ibid., p. 424; under the Navigation Act 1912-1925, s. 2 (1) (b). The Commonwealth claimed the power on the ground that the casualty occurred on the high seas or in waters used by ships engaged in trade or commerce with other countries or among the States.

42. (1921) 29 C.L.R. 357, where a unanimous judgment was delivered.

43. The "severability" provision in the current Navigation Act 1912-1973 (Comth.) was omitted as a result of the Act (No. 36 of 1958) (Comth.), s. 4. It appears that a principle of construction has been established. The High Court Judges will make every endeavour to give effect to provisions of the Act which are within the powers of the Commonwealth Parliament.



enabled the Commonwealth Parliament to authorise the inquiries into the casualty. The High Court had no difficulty in rejecting the argument. Section 478 was construed as merely enabling the legislatures of British possessions to enlarge the territorial jurisdiction of their courts but not to alter the nature of their powers. It does not affect the division of powers which the Commonwealth Constitution has made between the Commonwealth and each of the States.<sup>44</sup>

Broad View. We shall consider two cases which fall on the other side of the line. Where the necessary element of, or the relationship with,<sup>45</sup> inter-State or foreign trade or commerce is present, the Court may go to great lengths in favour of the Commonwealth.

A well-known example is found in Australian Coastal Shipping Commission v. O'Reilly.<sup>46</sup> By the Australian Coastal Shipping Commission Act 1956 (Comth.), a body corporate (the A.C.S.M.) was created. Its functions are to establish, maintain and operate shipping services which are limited to inter-State and overseas carriage and carriage to Territories. Section 36 (1) of the 1956 Act (Comth.) provides that the A.C.S.M. is not subject to taxation under the law of a State or Territory to which the Commonwealth is not subject. Apart from any question as to the scope of the application of section 36 (1), it is clear that, by section 109 of the Commonwealth Constitution, its operation must be to exempt the A.C.S.M. from liability to a State tax. There was no such exemption if section 36 (1) was found to be invalid. The question for the Court really was whether section 36 (1) was within the powers of the Commonwealth Parliament. It is noteworthy that the Court has endorsed the construction previously given to section 98. The section has been construed not as an independent grant of power but as a power explanatory of the power to legislate with respect to trade and commerce with other countries or among

44. The King v. Turner; Ex parte Marine Board of Hobart (1927) 39 C.L.R. 411, pp. 425-426, per Knox, C.J., Gavan Duffy, Rich and Stark, J J.

45. For the formulation and earlier application of these essential links or factors, see supra.

46. (1961-1962) 107 C.L.R. 46.

the States.<sup>47</sup> Five of the High Court Judges are clearly of the view "that the combination of s. 51 (i) with s. 98 gives the widest power to deal with the whole subject matter of navigation and shipping in relation to trade and commerce with other countries and among the States."<sup>48</sup> The power is held to be wide enough to establish a government shipping line, viz. a corporate agency of the Commonwealth, for the purpose of such trade and commerce. It is held to be sufficient to enable the Commonwealth Parliament to protect the A.C.S.M. from the embarrassment of taxation by the various States. An important test has been laid down in the case. The validity of a provision depends not on its motive but on its relevance or connection with the purpose.

Moreover, "the widest power" conferred to deal with the subject matter proper is held to be extended by section 51 (xxxix) of the Commonwealth Constitution. The provision authorises the Parliament to make laws with respect to matters incidental to the execution of any power vested by the Commonwealth Constitution in the Parliament. This has been treated as including not only what attends, or arises in, the exercise of legislative power but also what is incidental to the subject matter covered by the other paragraphs of section 51.<sup>49</sup> In effect, the principle established is this. A power to create implies a power to protect from State taxation. Doubtless, the Court has given the relevant provisions of the Commonwealth Constitution a wide scope.<sup>50</sup>

There seems to be a general reluctance on the part of the High Court of Australia to hold Commonwealth laws invalid unless

47. *Ibid.*, p. 54, per Dixon, C.J. Cf. The Owners of S.S. Kalibia v. Wilson (1910) 11 C.L.R. 689 and Australian Steamships Ltd. v. Malcolm (1914) 19 C.L.R. 298.

48. (1961-1962) 107 C.L.R. 46, p. 54.

49. *Ibid.*, p. 54, following the decision in Le Mesurier v. Connor (1929) 42 C.L.R. 481.

50. See *ibid.*, p. 55. The principle enunciated by Stone, C.J., of the Supreme Court of the United States in Pittman v. Home Owners' Loan Corporation (1939) 308 U.S. 21, p. 33, was adopted.

State rights are clearly infringed. In Victoria v. The Commonwealth,<sup>51</sup> the ship Kakariki was lying wrecked in Port Phillip Bay. By section 13 of the Marine Act 1928 (Vic.), if a ship was sunk in any port in Victoria, two justices might in certain circumstances issue a warrant for the removal of the wreck. The costs of removal were recoverable from the owner. Certain provisions of the Navigation Act 1912-35 (Comth.) were also involved. This Act (Comth.) had been reserved for His Majesty's pleasure. The Royal Assent is stated to have been proclaimed on the 11th July, 1935. Under section 329 of the Act (Comth.), the Minister is empowered to require the owner of a wreck, which is on or near the coast of Australia, to remove it. The owner is liable to pay the costs of removing the wreck where he fails to comply with the requisition of the Minister. The questions raised were whether section 329 also applied and, if so, whether there was inconsistency between the two sections. It was the plaintiff's contention that the Commonwealth section, properly construed, would not apply to the case. The wreck, being in inland waters, was not "on or near the coast of Australia." This was substantiated by an alternative argument. The Commonwealth Parliament had no power to legislate for inland waters because section 98 of the Constitution "is not an independent power but is only part of the power conferred by sec. 51 (i)...."<sup>52</sup>

Despite the cogent arguments of the plaintiffs, the Judges showed an unwillingness to curtail the legislative adventurism of the Commonwealth Parliament. This attitude is seen in two ways. Firstly, the Court ruled that section 13 of the Marine Act 1928 (Vic.) was a valid exercise of the State Parliament's power and in full force. Secondly, section 329 of the Navigation Act 1912-1935 (Comth.) was not held to be ultra vires the Commonwealth Constitution and was therefore valid. In holding that there was no conflict between the

51. (1937) 58 C.L.R. 618. This case, stated for the opinion of the High Court, was referred to the Full Court.

52. ibid., p.625.

two sections,<sup>53</sup> the Court was keeping the matter open to provide leeway for future developments in the field. One approach, not pursued by the defendants, was to argue that the wreck, though lying in inland waters, constituted an obstruction and a possible hazard to inter-State and foreign shipping and navigation. That, it is submitted, would enable the defendants to invoke "the widest power" doctrine previously formulated by the High Court in determining the scope of section 51 (i) read with section 98.<sup>54</sup>

Apart from the two specific instances, there is established in Australian Constitutional Law what is known as the "covering the field" test. It is attributed to the work of the High Court based on its examination of section 109 in a number of cases. Where this test applies, it operates to exclude the State Parliaments from legislating on the subject. It is also referred to as the concept of inconsistency on the ground that, where an item in section 51 is fully covered by Commonwealth legislation, State legislation on the item, whether passed before or after the Commonwealth law, will be rendered invalid. Dixon, J., (as he then was) in Ex parte McLean explains the operation of the test in these words:<sup>55</sup>

"It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

Thus, with regard to shipping matters and navigation, which are the subject of concurrent jurisdiction under the Commonwealth legislation, the application of this test will substantially reduce the powers

53. As to the meaning of "repugnancy", see The Union Steamship Co. of New Zealand Ltd. and Another v. The Commonwealth and Another (1925) 36 C.L.R. 130 pp. 148-150, per Isaacs, J.; Clyde Engineering Co. Ltd. v. Cowburn (1926) 37 C.L.R. 466, p. 478, per Knox, C.J., and Gavan Duffy, J. See also Bailey, "Inconsistency with Paramount Law" (1939-41) 2 Res Judicatae 9.

54. Australian Coastal Shipping Commission v. O'Reilly (1961-1962) 107 C.L.R. 46, p. 54, supra.

55. (1930) 43 C.L.R. 472, p. 483. This test was applied in O'Sullivan v. Noarlunga Meat Ltd. (1954) 92 C.L.R. 562; referred to in A Raptis & Son (Regd.) v. State of South Australia [1976] 15 A.L.R. 223.

of the State Parliaments.

3. Section 51 (xxix)

A recent decision which has unprecedented constitutional implications for both the States and the Commonwealth is New South Wales v. The Commonwealth.<sup>56</sup> The Seas and Submerged Lands Act 1973 (Comth.) gave statutory effect to the two Geneva Conventions of 1958. They are the Convention on the Territorial Sea and the Contiguous Zone, and the Convention on the Continental Shelf. The Act provided, inter alia, that the sovereignty in respect of the territorial sea, its bed and subsoil was vested in and exercisable by the Crown in right of the Commonwealth. The sovereignty regarding the "internal waters of Australia (that is to say, any waters of the sea on the landward side of the territorial sea) in so far as they extend from time to time, and in respect of the sea-bed and sub-soil beneath those waters"<sup>57</sup> is similarly vested in and exercisable by the Crown. The Governor-General was empowered to determine the breadth of the territorial sea, and/or the baseline from which the breadth of the territorial sea or any part thereof was to be measured. Section 14 of the 1973 Act (Comth.) recognised the rights of the States in respect of the waters of the sea of or within any bay, gulf, estuary, river, creek, inlet, port or harbour. In respect of such rights, a State had sovereignty both before and after Federation. Section 15 excepted from the sovereignty of the Crown in right of the Commonwealth "wharves, jetties, piers, breakwaters, buildings, platforms, pipelines...cables or other structures or works."

All the six Australian States brought actions in the High Court against the Commonwealth of Australia, seeking declarations that the Act was wholly or partially invalid. The plaintiff States argued that they had, prior to the Federation and continued to have after

56. (1976) 50 A.J.L.R. 218. The case was argued before the Full Court of the High Court: p. 219.

57. Seas and Submerged Lands Act (Comth.) (No. 161 of 1973), s. 10.

Federation, sovereignty and legislative power over the territorial sea adjacent to their coasts up to a three-mile limit. Their claims included the sea-bed and the subsoil of the territorial sea. The High Court rejected the argument and held that the 1973 Act (Comth.) was a valid exercise of the external affairs power conferred by section 51 (xxix) of the Commonwealth Constitution. This "external affairs" power is held to extend to the implementation of international conventions to which Australia is a party. It can also extend to "matters or things external or situated outside Australia, or to persons outside Australia and their activities." A colossal blow was dealt to the territorial claims of all the six States. The High Court has categorically held that "the low-water mark constituted the relevant seaward boundary of their territory for the exercise of sovereignty and legislative power."<sup>58</sup>

In many respects, this decision has serious ramifications for the States. Apart from those areas, places and structures excepted by sections 14 and 15 of the 1973 Act (Comth.), the "external affairs" power may enable the Commonwealth to regulate and control coastal shipping. This power is exercisable over a broad expanse stretching from the low-water mark outwards round the whole of Australia, including the territorial sea.<sup>59</sup> Hence the power to regulate inter-State and intra-State shipping by way of licensing, once beyond the competence of the Commonwealth Parliament, would be exercisable under section 51 (xxix). International shipping conventions, when ratified by Australia, may be implemented and given statutory effect to operate alongside each State coastline, beyond the low-water

58. (1976) 50 A.J.L.R. 218, p. 219, the proposition has been laid down by five of the Judges. But Barwick, C.J., and Windyer, J., in Bonser v. La Maccha (1968-1969) 122 C.L.R. 177 held that a State Parliament is competent to make laws having extraterritorial effect if those laws are for the peace, order and good government of the State.

59. This term is now defined by international agreement contained in the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958, and the Geneva Convention on the Continental Shelf, 1958. Australia is a signatory to these two conventions: (1976) 50 A.L.J.R., p. 265.

mark. Naturally, this avenue of power, when stated in such broad terms, foreshadows the steady decline of State shipping legislation. One disturbing reality the States must learn to live with is the tightening controls which Commonwealth laws can impose on coastal and intra-State shipping. The reason is that section 92 of the Commonwealth Constitution does not operate to guarantee the freedom of purely intra-State trade. Moreover, it is arguable that State laws which purport to operate beyond the low-water mark would be invalid as the area is outside the jurisdiction of the State Parliaments.<sup>60</sup>

The crippling effects of the Seas and Submerged Lands Act 1973 (Comth.), as reinforced by the High Court decision, are forestalled by an agreement<sup>61</sup> made between the Commonwealth Government<sup>62</sup> and each of the State Governments. Legislation in identical terms has been passed by all the six States giving statutory effect to the agreement.<sup>63</sup> The object is to extend the legislative powers of the States in relation to their respective coastal waters. This is achieved in an ingenious way. Firstly, the term "coastal waters of the State" is defined to include any sea that is on the landward side of the territorial sea of Australia even though it is not within

60. Unless such laws are permitted to operate extraterritorially by Imperial legislation. For example, the Merchant Shipping Act 1894 (Imp.) s. 478 which may confer on a colonial tribunal extraterritorial jurisdiction: The King v. Turner; Ex parte The Marine Board of Hobart (1927) 39 C.L.R. 411, p. 430.

61. It was made at the request of the State Parliaments in pursuance of the Commonwealth Constitution, s. 51 (xxxviii).

62. The Coastal Waters (State Title) Act (No. 77 of 1980) (Comth.) was passed to extend the legislative powers of the States in and in relation to coastal waters. By s. 7, the Commonwealth Places (Application of Laws) Act 1970-73 (Comth.) has effect in respect of any place in the coastal waters of a State (which is defined in s. 3 as a Commonwealth place) as if that place were within the limits of a State.

63. See Constitutional Powers (Coastal Waters) Act (No. 138 of 1979) (N.S.W.), Constitutional Powers (Coastal Waters) Act (No. 1 of 1980) (Qld.), Constitutional Powers (Coastal Waters) Act (No. 68 of 1979) (S.A.), Constitutional Powers (Coastal Waters) Act (No. 62 of 1979) (Tas.), Constitutional Powers (Coastal Waters) Act (No. 9366 of 1980) (Vic.), Constitutional Powers (Coastal Waters) Act (No. 95 of 1979) (W.A.).

the limits of the State or of a Territory.<sup>64</sup> Secondly, the legislative powers exercisable by each State extend to the making of -<sup>65</sup>

"(a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State...were within the limits of the State...;

(b) laws of the State having effect in or in relation to waters within the adjacent area in respect of the State, but beyond the outer limits of the coastal waters of the State...."

The agreement provides a practical solution to the problems as long as the present policy of the Commonwealth Government remains unchanged. But it does not give force or effect to any provision of a State law to the extent of any inconsistency with a Commonwealth law.<sup>66</sup> Nowhere in the agreement, or the legislation giving effect thereto, is the Commonwealth Parliament debarred from enacting laws to extend to those waters over which the States are currently conceded legislative jurisdiction.

#### V. CONCLUSION

The acquisition of the Dominion status by the Commonwealth under the Statute of Westminster Adoption Act 1942 (Comth.) carries with it full powers to make laws having extraterritorial operation. As the first classic exercise of the new constitutional powers, the Navigation Amendment Act 1979 (Comth.) was passed.<sup>67</sup> It repealed Part VIII and also sections 221 to 222 of the Merchant Shipping Act 1894 (Imp.), which had applied to the Commonwealth by paramount force. In the recent case of Kirmani v. Captain Cook Cruises Pty. Ltd.: Green, Third Party,<sup>68</sup> the validity of the repeal of Part VIII of the 1894 Act (Imp.) was considered by seven High Court Judges. The judgments of Mason, Murphy, Brennan and Deane, J J., are of great constitutional significance. They held that section 104 (3) of the

64. In each Act, s 3 (1) or Schedule para. 3 (1).

65. Ibid., s. 5 or Schedule para. 5.

66. Ibid., 7 (c) or Schedule para. 7 (c).

67. No. 98 of 1979. For more detailed treatment of this Act, see Chapter Eight.

68. (1985) 59 A.L.J. 265. See Chapter Eight.



Navigation Amendment Act 1979 (Comth.) is not only a valid enactment but also has the effect of repealing Part VIII of the 1894 Act (Imp.) in its operation as part of the law of New South Wales. The injury, for which the action was brought, was negligently caused to the plaintiff, while being carried on a cruise in Sydney Harbour in a vessel belonging to the defendant company. It is remarkable that the Commonwealth Parliament is deemed to have had power to enact legislation which applies to shipping business conducted well within State waters. There was evidence that the passenger-carrying vessel only provided cruises wholly within Sydney Harbour and was not meant for sea-going. From the viewpoint of State constitutional powers, what is unacceptable is the construction put by three of the Judges<sup>69</sup> on the concluding provision of section 2 (2) of the Statute of Westminster 1931 (Imp.). In their judgments, an Imperial law which applies to an Australian State is "part of the law of the Dominion" and is therefore within the power of the Commonwealth Parliament to amend or repeal. This reasoning - it is submitted - constitutes an encroachment upon the State legislative powers.

Another development of outstanding significance is the enactment of the Shipping Registration Act 1981 (Comth.).<sup>70</sup> It repealed Part I of the Merchant Shipping Act 1894 (Imp.), which again had applied to the Australian States by paramount force.<sup>71</sup> The absence in the case reports dealing with ship mortgages of any attempt to challenge the validity of the 1981 Act (Comth.) is an indication of the weight of legal opinion regarding its inviolable status.<sup>72</sup>

69. See judgments of Mason J., (*ibid.*), p. 276; Brennan (*ibid.*), pp. 285-286; Deane J., (*ibid.*), pp. 298-299. Gibbs, C.J., however, was of the view that s. 104 of the 1979 Act (Comth.) was invalid in so far as it attempted to repeal the Merchant Shipping Act 1894, (Imp.), s. 503, in its operation as part of New South Wales law, *ibid.*, p. 272.

70. No. 8 of 1981.

71. *Ibid.*, ss. 3 (1) and 4.

72. General Credits (Finance) Pty. Ltd. v. Registrar of Ship and Another [1982] 44 A.L.R. 571 and Re North Brisbane Finance and Insurances Pty. Ltd. (1983) 8 A.C.L.R. 274. In both these cases, the Shipping Registration Act 1981 (Comth.) was involved.

State enactments, which have extraterritorial operation for the regulation of coasting trade, continue to depend for their validity by meeting the requirements of sections 735 and 736 of the 1894 Act (Imp.). It is not purely an academic question to ask how the currently valid State enactments will be affected if the two sections are repealed by Commonwealth legislation. It appears that, unless the repealing Act contains saving provisions such State enactments will cease to be operative.

A partial solution to the problem faced by the States is provided by the constitutional powers (coastal waters) legislation.<sup>73</sup> It enables the enactments of each State to operate extraterritorially in its coastal waters. Subject to one exception, the expression "coastal waters of the State" means "the part or parts of the territorial sea of Australia that is or are within the adjacent area of the State."<sup>74</sup> However, in terms of the physical limits imposed by such legislation, State Parliaments can only enact laws to regulate intra-State trade. Thus State enactments can apply to ships trading between ports within the same State even though they traverse the coastal waters of the State. Similarly they can apply to towage and salvage operations carried out within such waters.

73. Constitutional Powers (Coastal Waters) Act (No. 138 of 1979) (N.S.W.), Constitutional Powers (Coastal Waters) Act (No. 1 of 1980) (Qld.), Constitutional Powers (Coastal Waters) Act (No. 68 of 1979) (S.A.), Constitutional Powers (Coastal Waters) Act (No. 62 of 1979) (Tas.), Constitutional Powers (Coastal Waters) Act (No. 9366 of 1980) (Vic.), Constitutional Powers (Coastal Waters) Act (No. 95 of 1979) (W.A.).

74. In each Act, s. 3 (1) or Schedule para. 3 (1).

## CHAPTER IV

### POLICY OF SHIP REGISTRATION ACTS

#### I. INTRODUCTION

The object is to trace the origin and growth of Britain's policy which was designed to establish an Empire-wide fleet of British ships.<sup>1</sup> Various means, including penalties and economic benefits, were employed by British legislators to achieve their goals. In the process of developing an exclusive "British ship" policy, the principles of equity were rendered inapplicable to dealings in ships and shares therein. The purpose was to prevent foreigners from acquiring an interest in British ships. The principles of equity were later reinstated as part of the law and have remained ever since. There is evidence that the harm done, particularly to innocent victims, outweighed the advantages derived. It is interesting to consider how, for the purpose of raising finance from foreigners, two types of property in British ships or shares therein were created by the formative legislation. They were the rights of registered owners and the rights of mortgagees. The distinction was a welcome modification of the strict "British ship" doctrine.

It is questionable how far Britain has succeeded in entrenching the basic principles of her merchant shipping legislation as a permanent part of the Commonwealth law. The effects of the exercise will be evaluated. An analysis of the main provisions of the Shipping Registration Act 1981 (Comth.)<sup>2</sup> and the case authorities will indicate the extent to which the Commonwealth policy corresponds to its Imperial counterpart.

#### II. EARLY DEVELOPMENTS

##### 1. Beginnings of Ship Registration

The statute (Imp.) of William III is the starting point for the concept of British ships. As from 25th March, 1696, the status of

1. As to Acts which encouraged the increase in shipping, navigation and trade in the Empire, see the long title of the Act (1663) 15 Car. II, c. 7. Part of the preamble to the Act, (1823) 4 Geo. IV, c. 41 read: "Whereas the Wealth and Strength of this Kingdom, and the prosperity and Safety of this Kingdom and every part of the Empire depend on the encouragement given to Shipping and Navigation...."

2. No. 8 of 1981.

"English-built" ships as the qualification for trading in the American plantations was based on registration.<sup>3</sup> It was introduced to exclude foreigners from holding any share or interest in such ships and to prevent foreign ships from passing off as "English-built" ships. The idea of ship registration as a tangible evidence of nationality and political link was consistently pursued by succeeding legislators. By a statute (Imp.) of George III passed in 1786,<sup>4</sup> registration was made compulsory. It applied to ships or vessels, having a deck or being of the burden of fifteen tons and above, which were owned by Her Majesty's subjects in Great Britain or any of the British colonies, plantations or territories.<sup>5</sup>

One of the distinguishing marks was the port identity. Every ship was assigned a home port in a British province or colony, where she was registered. The port was the place with which she was usually associated in trade, or where her master or owners usually resided.<sup>6</sup> A definite link between the ship and the port was established in 1823.<sup>7</sup> By section 10 of the statute (Imp.) of George IV, a ship was deemed to belong to the port where, or near which, one of the owners took and subscribed the oath. This requirement made it easier for British authorities to ascertain the whereabouts of British ships. But it was no safeguard against foreign ships operating in British ports. For quick, visual identification, section 19 of the statute (Imp.) of George III required every ship, within one month of her registration, to have her name and home port painted in white or yellow letters on a conspicuous part of her stern. A heavy penalty was imposed on the owners or master who unlawfully altered, obliterated or concealed her name or caused her to be described by another name.<sup>8</sup> No change of name or home port was permitted except by registering her de novo.<sup>9</sup>

3. (1696) 7 & 8 Will. III, c. 22, s. 17.

4. (1786) 26 Geo. III, c. 60.

5. Ibid., s. 3.

6. Ibid., s. 5.

7. 4 Geo. IV, c. 41.

8. (1786) 26 Geo. III, c. 60, s. 19.

9. (1823) 4 Geo. IV, c. 41, ss. 22 and 26; (1825) 6 Geo. IV, c. 110, s. 24; (1845) 8 & 9 Vic., c. 89, s. 31.

It has become a feature of modern legislation for a ship's name and home port to be painted in bold letters on the hull.

As the system of registration depended on the precise identity of each ship, stringent requirements had to be met in each case. An overriding consideration was to prevent foreign-owned or foreign-built ships from being registered and enjoying the substantial advantages accorded to British ships. By a statute (Imp.) of George III<sup>10</sup> any person applying for ship registration in Great Britain, Guernsey, Jersey or the Isle of Man had to comply with prescribed procedures. Firstly, he was required to produce to the Registrar "a true and fair account" issued by the builder relating to the ship, her tonnage and the first purchaser(s). Secondly, he had to take an oath that the ship, for which registration was being sought, was the same as that described in the builder's statement.<sup>11</sup> It became clear that the second method of identifying ships was not satisfactory. It placed too heavy a burden on the owners. Moreover, it was often impossible for purchasers of secondhand ships to vouch that no alterations had been made to them. A realistic approach to the problem was introduced. It was mandatory for every ship, prior to registration, to be accurately examined and admeasured in the presence of the master with regard to the particulars stated.<sup>12</sup> The master was required to sign the survey certificate issued by the surveyor appointed by the Commissioners of His Majesty's Customs. For uniformity, the admeasurement for ascertaining tonnage was prescribed.<sup>13</sup>

Another object of the survey work was to uncover the use of any foreign-made keel or bottom, as well as any unauthorized repairs effected in foreign ports.<sup>14</sup> For the purpose of ship registration, the survey certificate had to be produced to the Collector and Comptroller of Her Majesty's Customs. At each ship's home port, a record

10. (1786) 26 Geo. III, c. 60.

11. *Ibid.*, s. 20.

12. *Ibid.*, s. 12. This method of checking the accuracy and correctness of the particulars had been consistently followed: 4 Geo. IV, c. 41, s. 14; 8 & 9 Vic., c. 89, s. 15.

13. 4 Geo. IV, c. 41, s. 15; 8 & 9 Vic., c. 89, s. 16.

14. 26 Geo. III, c. 60, ss. 1 and 2. As to consequences where repairs were done in a foreign port, see *infra*.

of her history was kept. The system of registration depended upon maintaining an accurate description of the ship. It meant that British shipowners had to comply with demanding and fastidious requirements. Where a ship was, for any reason, so altered as not to correspond with all the particulars in the registration certificate, she had to be registered de novo. This requirement had to be met as a matter of urgency on her return to her home port or any port in a British colony or territory.<sup>15</sup> Failure on the part of her owners meant de-registration with serious consequences.

## 2. Advantages of the System

The system of ship registration was an important part of Britain's plan to expand overseas. Under the statute (Imp.) of 1786, no ships, though owned by British subjects, were entitled to the privileges or advantages of English-built ships, unless they were wholly built in Great Britain or in one of Her Majesty's Dominions.<sup>16</sup> Moreover, an English-built ship would lose her privileges if the costs of the rebuilding or repairs effected in a foreign port exceeded fifteen shillings per ton. An exception was allowed where the ship was so badly damaged that the repairs done were necessary to enable her to return safely to some port in Her Majesty's Dominions.<sup>17</sup> The 1786 statute (Imp.) was an immense boost to shipbuilding and ship-repairing industries in Britain and also the overseas settlements and colonies. For over half a century, this legislative emphasis on British-built ships was consistently maintained. The extensive tonnage of British ships afloat paved the way for the realization of Britain's predetermined goals.

A British "ship may be considered as a floating island,"<sup>18</sup> and symbolised British influence<sup>19</sup> wherever she happened to be. The

15. (1823) 4 Geo. IV, c. 41, s. 26; (1833) 3 & 4 Will. c. 55, s. 28.

This principle was consistently adhered to in subsequent legislation.

16. 26 Geo. III, c. 60, s. 1. An exception applied to foreign-built ships which had been captured and condemned as prizes. Such ships were permitted to be registered.

17. *Ibid.*, s. 2; 4 Geo. IV, c. 41, s. 6.

18. *Forbes v. Cochrane* (1824) 2 B. & C. 448, at p. 464, *per* Holrod, J.

19. Even though a British ship is not accurately described in law as part of the United Kingdom: *R v. Gordon-Finlayson* [1941] 1 K.B. 171, at pp. 178-179.

overall impact created on the colonial peoples overseas by the magnitude of Britain's merchant navy often set the stage for acceptance of British traders and customs. This factor was only one facet of a well-designed Imperial policy.

The statutory requirement that a ship was to be registered at her usual trading port, or at a port close to her owners' residence, had far-reaching significance. It ensured a fair distribution of British ships throughout the overseas settlements and colonies. It led to the establishment of new registries in many ports and places outside Great Britain. This growth is obvious from a study of the Imperial Acts passed between 1696 and 1894.<sup>20</sup>

Dealings in ships, e.g. sales and mortgages, usually involved the use of bills of sale and the application of English law. The result was the dissemination of English maritime law and admiralty practice in Britain's vast overseas territories and colonies. Britain's maritime strength lay in having all her merchant ships, wherever registered, operating under the same code which applied throughout the Empire. For example, the provisions on ship registration and ownership in Part II of the Merchant Shipping Act 1854 (Imp.)<sup>21</sup> and Part I of the Merchant Shipping Act 1894 (Imp.)<sup>22</sup> applied to the whole of Her Majesty's Dominions. Until recently, a large majority of the provisions of the 1894 Act applied, by paramount force, to the Commonwealth and the Australian States as part of their laws.<sup>23</sup>

Another aspect of the policy was the promotion of employment of British subjects in Britain, her colonies and the plantations. It was first introduced by a statute (Imp.) of Charles II.<sup>24</sup> Ships carrying goods into or out of Asia, Africa or America were required to be navigated by masters and three-fourths of the mariners, who were from those colonies or plantations.<sup>25</sup> In the reign of George III, what

20. See for example, (1833) 3 & 4 Will. IV, c. 55, s. 3 (1845) 8 & 9 Vic., c. 89, s. 3; (1854) 17 & 18 Vic., c. 103, s. 30; (1894) 57 & 58 Vic., c. 60, s. 4.

21. S. 17.

22. S. 91.

23. On 26th January, 1982, Part I of the Merchant Shipping Act 1894 was repealed in so far as its application to Australia is concerned. See infra.

24. See (1660) 12 Car. II, c. 18, s. 2.

25. (1696) 7 & 8 Will. III, c. 22, s. 2.

began for prestige or security reasons, as an exception to the rule, was adopted by succeeding Parliaments as the norm. By the statute (Imp.) of 1794, ships carrying goods into many parts of Her Majesty's Dominions had to be manned and navigated in the same way.<sup>26</sup> A clear legislative bias towards job creation for British subjects is seen in many instances. Ships, including fishing boats, on any voyage within the United Kingdom and between certain ports were required to have on board full complements of British masters and British mariners.<sup>27</sup> A few rigid exceptions were made. Foreign mariners, to the extent of one fourth of the total crew number, could be engaged in fishing boats as fishing instructors or in some such capacity.<sup>28</sup> With regard to ships operating in certain places and outside the United Kingdom, the required proportion of British seamen had to be maintained for the whole voyage except in cases of emergency, e.g. sickness, desertion or death.<sup>29</sup> For many decades, continued legislative efforts were made in various ways to encourage British seamen,<sup>30</sup> improve the seafaring industry, and to provide for seamen's widows and children.<sup>31</sup>

Several secondary goals were also achieved as part of the policy. Young and able men from the colonies and elsewhere were attracted into the fast-growing merchant navy. Further provisions were made to enable the recruits to qualify as British subjects by swearing allegiance to His Majesty.<sup>32</sup> Interference with Britain's merchant shipping due to pirates,<sup>33</sup> attacks by hostile vessels and

26. (1794) 34 Geo. III, c. 68, s. 1. Under (1845) 8 & 9 Vic., c. 88, s. 13, no ship would be admitted as British unless, inter alia, she was navigated during the whole of every voyage by a master and three-fourths of the crew, who were British subjects.

27. (1794) 34 Geo. III, c. 68, s. 4.

28. Ibid., s. 4. These exceptions were permitted on special grounds for the benefit of the fishing industry.

29. Ibid., s. 5.

30. See e.g. the long title of Act (1835) 5 & 6 Will. IV, c. 24.

31. (1834) 4 & 5 Will. IV, c. 52, s. 2.

32. E.g. 34 Geo. III, c. 68, s. 6 defined who, and how a person, could qualify as a British master or mariner.

33. Indirect references to such matters can be gathered from Acts (1744) 18 Geo. II, c. 30 and (1837) 7 Will. IV & 1 Vic., c. 88.



malicious damage to ships could be readily dealt with.<sup>34</sup>

It is unrealistic to ignore the revenue-raising aspect of the system. One of the officials authorized to grant registration certificates in the colonies was the Collector and Comptroller of Her Majesty's Customs. The statute (Imp.) of George III, passed in 1786, appears to have been the starting point for the revenue-raising exercise. It may be recalled that in each case the registration certificate would only be issued after a bond was given by the master and shipowner. The amount specified in the bond would be forfeited to Her Majesty where any of the statutory conditions attached to its issue was breached.<sup>35</sup> By the 1845 Act (Imp.) the bonds to be given were liable to the same stamp duties as bonds given for duties of customs.<sup>36</sup>

Certain exceptions aside, stamp duties and fees were payable on the registration or re-registration of a ship and on the transfer of shares therein. A ship had to be re-registered when she was transferred to another port for registration, her certificate was lost or mislaid, or any change was made to the ship. Statutory division of property in a ship into sixty-four shares,<sup>37</sup> the compulsory use of bills of sale for transfer, and her ownership by a maximum of thirty-two persons,<sup>38</sup> were clearly designed to generate stamp duties and fees. Until legislation was sufficiently developed to protect the interests of financiers, mortgage of ships or shares therein for the purpose of security took the form of transfer of the property to mortgagees as in a normal sale.<sup>39</sup> In practice, the mortgagees would be registered as the new owners.

34. See generally the long titles of the Acts, (1827) 7 & 8 Geo. IV, c. 30 and (1837) 7 Will. IV & 1 Vic., c. 89.

35. (1786) 26 Geo. III, c. 60, s. 15.

36. (1845) 8 & 9 Vic., c. 89, s. 25.

37. However, any proportion smaller than 1/64 part of a ship could be transferred without stamp duty: (1823) 4 Geo. IV, c. 41, s. 30.

38. (1786) 26 Geo. III, c. 60, s. 37.

39. See *infra*.

One of the outstanding economic benefits Britain derived by implementing the concept of British ships was their immeasurable earning capacity. The enormous freight revenue served to finance Britain's Empire-building programme.

However, the ship registration policy had its undesirable consequences. The substantial advantages conferred on British ships led to their capture and being held to ransom. In some cases, they were used illegally by enemy captors as "British ships". To deal with such problems, a statute (Imp.) of George IV was passed. It provided that a British ship which had been captured by or become prize to an enemy, or sold to foreigners, would never again be entitled to the privileges. The policy remained unchanged for over two decades.<sup>40</sup> Moreover, the law encouraged British mariners to capture enemy ships. Captured enemy ships would be condemned in a court of admiralty as prize of war. They could then be registered so as to augment the British merchant fleet.<sup>41</sup>

### III. IDENTIFICATION OF SHIPOWNERS

One of the elements underlying the system of registration was the disclosure of the owners of the ship and their nationality. This requirement was first introduced by the statute (Imp.) of William III, passed in 1696. Before any ship could be registered, her owners had to take an oath which was administered and attested by the Governor or customs officer. It stated, inter alia, the name of the ship's master, the names and particulars of the owners, and that no "foreigner directly or indirectly had any share, part or interest therein."<sup>42</sup> After registration, the oath was delivered to the ship's master for the security of her navigation. The object was to ensure that the identity of the shipowners and their nationality could be well established. However, by the late eighteenth century, due to the dramatic increase in the numbers of ships and shipowners at most of the ports, two additional forms of identification were introduced. Firstly, where

40. (1823) 4 Geo. IV, c. 41, s. 8; (1845) 8 & 9 Vic., c. 89, s. 9.

41. As a policy matter, an important exception was made by the British Parliament for such ships to be registered at certain ports: (1786) 26 Geo. III, c. 60, s. 1; (1845) 8 & 9 Vic., c. 89, s. 33.

42. 7 & 8 Will. III, c. 22, s. 17.

a ship belonged to two or more owners or joint owners, one of the owners or joint owners who was resident within twenty miles of the registry was bound to take the oath.<sup>43</sup> Even if none of them resided within the twenty-mile vicinity, the oath still had to be taken. If the requisite number of owners or joint owners failed to attend and subscribe the oath, then an additional oath had to be taken by the same owner or joint owner.<sup>44</sup> The penalty imposed for making a false oath was the same as for wilful and corrupt perjury.<sup>45</sup> Secondly, the statute (Imp.) of George III reinforced the doctrine of "owner" identification by introducing a different oath format. Sworn statements had to be made relating to the names, occupations, residences and the business associations of all the owners. They included the nature and extent of the interest of owners in the ship, and information as to how and when they acquired British citizenship.<sup>46</sup> This form of statutory oath was used for almost six decades.

Under the Merchant Shipping Act 1854 (Imp.), further requirements for identifying the owners had to be met. No person could be registered as owner of a ship, or any share therein, until he had made and subscribed a declaration in the prescribed form.<sup>47</sup> For the purpose of personal identification, the declaration had to be made before the Registrar at the Port of Registry or, if the owner lived more than five miles away from the port, before any Registrar or Justice of the Peace.<sup>48</sup>

In the seventeenth century, joint stock companies and bodies corporate began to replace individuals as owners of ships.<sup>49</sup> Despite the Bubble Act 1720 (Imp.)<sup>50</sup> which struck down unincorporated associations, the courts continued to recognise the deed of settlement

43. (1786) 26 Geo. III, c. 60, s. 10.

44. Ibid., ss. 10 and 11.

45. Ibid., s. 41. As to provision for recovery of penalties, see s. 42.

46. Ibid., s. 10.

47. See 17 & 18 Vic., c. 104, Schedule, Form B for individuals, and Form C for a body corporate.

48. Ibid., s. 38.

49. H.A.J. Ford, Principles of Company Law (3rd Ed. 1982), para. 107.

50. 6 Geo. IV, c. 91.

companies. If the shares were only transferable with the approval of the trustees under the deed, a company with objects beneficial to the community was considered by the jury to be outside the Act. As a joint stock company, it often attracted investments from many subscribers. Attempts, however, were made by merchants to obtain incorporation under the Bubble Repeal Act 1825 (Imp.),<sup>51</sup> the Trading Companies Act 1834 (Imp.)<sup>52</sup> and private Acts (Imp.). It was not until the Joint Stock Companies Registration and Regulation Act 1844 (Imp.)<sup>53</sup> was passed that a general form of incorporation for trading companies by registration was provided.

Section 31 of the statute (Imp.) of George IV<sup>54</sup> made provision for the ownership of ships by joint stock companies and corporate bodies. With the permission of the Commissioners, a joint stock company could appoint as trustees three of its members to take the oath at the ship registry. They were required to state the name and description of the company to which the ship belonged. In the case of a corporate body in the United Kingdom, the secretary or other officer would take the oath declaring the name and description of the corporate body which owned the ship.<sup>55</sup>

The thrust of the doctrine of "owner" identification was towards preventing foreigners from acquiring an interest in British ships. The case of The King of the Two Sicilies v. The Peninsular and Oriental Steam-Packel Co.<sup>56</sup> concerned allegations of contravention of a ship Registration Act (Imp.) of Queen Victoria.<sup>57</sup> Two foreigners were sent to England by a usurping Sicilian government to purchase a vessel from the defendant company. The ship was transferred by a bill of sale to two persons alleged to be trustees for the foreigners. When the rightful government was restored, the plaintiff filed a bill to restrain the defendant company from parting with the ship. It was alleged that the purchase money was taken from the royal treasury and that the defendant company had conspired with two foreigners to evade the provisions of the ship Registration Act. The company

51. 6 Geo. IV, c. 91.

52. 4 & 5 Will. IV, c. 94.

53. 7 & 8 Vic., c. 110.

54. (1823) 4 Geo. IV, c. 41.

55. Ibid., s. 31.

56. (1849-1850) 19 L.J. Ch. (N.S.) 488.

57. (1845) 8 & 9 Vic., c. 89, ss. 5, 12 and 13 (1). This Act is also referred to as the "Ship Registry" Act.

sought to sidestep the allegations. It demurred that by answering the bill they would expose themselves to pains and penalties under the ship Registration Act (Imp.) and to an indictment under the Foreign Enlistment Act (U.K.).<sup>58</sup> The demurrer was overruled. The allegations were seen as possible acts of sabotage of the British shipping policy. Wigram, V.C., said:<sup>59</sup>

"I am not prepared to say no fraud has been committed upon the [ship registration] Act."

The doctrine of "owner" identification changed in scope. Its requirements were no longer confined to the disclosure of strictly legal interest. The aim of the legislators was to make public any person who had anything to do with the ownership or control of British ships. Under the statute (Imp.) of George III<sup>60</sup> the word "property" was given a wide meaning. After 1st January, 1795, no instrument contract or agreement for the transfer of property in any ship would be valid for any purpose, in law or in equity. The mode of transfer prescribed by legislation was by bill of sale containing a recital of the registry certificate.<sup>61</sup> In Biddell v. Leeder and Pulham,<sup>62</sup> an executory agreement to transfer a share in a ship was held to be void because the above requirement was not met. Bayley J., said:<sup>63</sup>

"...the object of the Legislature was plainly to extend the provision [i.e. section 14] to agreements to transfer as well as to actual transfers. By the later, the property would immediately vest in the transferee, by the former ...he would take an equitable interest until the completion of the sale; and in the meantime might have a material control and use of a ship. The object of the Legislature would not be answered, unless it be made publicly known who has the equitable right to the control and use of the ship. It is of importance to Government to have the means of ascertaining, at any time, who have the power over the use and destination of ships, and the appointment of the masters."

58. (1819) 59 Geo. III, c. 69, s. 7 (2).

59. (1849-1850) 19 L.J. Ch. (N.S.) 488, p. 491.

60. (1794) 34 Geo. III, c. 68.

61. Ibid., s. 14.

62. (1823) 1 B. & C. 327.

63. Ibid., 333.

Consistent with the basic object of the doctrine, the statute of George IV added a new disclosure requirement. Apart from one exception,<sup>64</sup> a bill of sale or other instrument by itself was not valid to pass the property in any ship, or any share therein. The particulars of the bill of sale or other instrument had to be endorsed on the ship's registration certificate.<sup>65</sup> Otherwise persons would be content to have "the profits and management of ships, without having the legal ownership, and might remain unknown."<sup>66</sup> It would be seen that the measures imposed are really part of a legislative design to create a special class of property in ships.

An important issue arose in The Queen on the Prosecution of The Pacific Steam Navigation Company v. Elias Arnault and Thomas Powell.<sup>67</sup> Some foreigners were members of a British company incorporated by charter for the purpose of purchasing and employing ships. The Court of Queen's Bench had to consider whether, by allowing the company to be registered as owner of British ships, the general policy and object of Britain's navigation laws would be breached. One objection raised against the registration was that the statute (Imp.) of Victoria<sup>68</sup> would prohibit foreigners from obtaining indirectly, as members of a corporation, those benefits from which, as individuals, they were debarred. Although a unanimous decision was given in favour of the company, the three judges differed in their reasoning. Weightman, J., held that a corporation "may be a ship-owner", not "as a British subject, but as an excepted case."<sup>69</sup> Coleridge, J., regarded the interest of the members of a corporation to be too remote. Lord Denman, C.J., took a realistic and fairly broad view of the matter. He said:<sup>70</sup>

64. I.e., where a ship was about to be registered de novo.

65. 6 Geo. IV, c. 110, s. 36; other formalities also had to be satisfied.

66. Biddell v. Leeder and Pulham (1823) 1 B. & C. 327, 335, per Best, J.

67. (1847) 16 L.J.Q.B. (N.S.) 50.

68. (1845) 8 & 9 Vic., c. 89.

69. (1847) 16 L.J.Q.B. (N.S.) 50, 53.

70. Ibid., 55. He was of the view that if any evil consequence arose it could be remedied by the legislature or by repealing the letters patent.

"...the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the 5th section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company...The terms of the 23rd section, with respect to the condition of the bond to be given upon obtaining the registry, as to foreigners purchasing or becoming entitled to any part or share of or interest in any ship or vessel, would be applicable to a case of purchase or transfer of property in the vessel itself...and does not, it seems to us, bear materially on the present question."

By holding that the British corporation was the legal owner of the ship, Lord Denman was in fact subsuming the nationality and identity of its members under the principle of separate legal entity.<sup>71</sup> He did not consider that the object of the Registration Acts would warrant the corporate veil to be pierced. That the principle has no application to partnerships is clear from the Western Australian decision in Ybasco v. Dakas and Dakas.<sup>72</sup> The Pearling Act 1912-1935 (W.A.)<sup>73</sup> excluded foreigners from engaging in the pearling industry, except as divers or pearl dealers. The plaintiff in the action was a foreigner. He sought a declaration that he was a partner with the defendants and that he was entitled to a share of the net assets and profits of the pearling business. In giving judgment for the defendants, Walker, J., rigorously applied the policy of the Act (W.A.) to the partnership.

#### IV. EFFECTS ON PROPERTY

We have considered the objects of the British system of ship registration.<sup>74</sup> The Act (Imp.) which further implemented the Imperial policy was passed in 1786.<sup>75</sup> It did not allow any property to exist, or to be acquired by any British subjects, in a British ship unless it was conveyed in the manner specified in section 17.<sup>76</sup> A serious oversight on the part of the legislature in framing the enactment was the total neglect in considering its effect upon the principles administered

71. The doctrine was later endorsed by the House of Lords in the wellknown case of Salomon v. Salomon & Co. Ltd. [1897] A.C. 22.

72. [1948] 51 W.A.L.R. 22.

73. Act No. 45 of 1912, as amended.

74. See Hubbard v. Johnstone (1810) 3 Taunt 178, 212, per Wood B; see also (1696) 7 & 8 Will., c. 22, s. 17.

75. (1786) 26 Geo. III, c. 60.

76. Whenever property in any British ship was transferred, the registration certificate of the ship had to be truly and accurately cited in the bill of sale. Otherwise the bill of sale would be void.

by courts of equity. In short, the distinction between legal and equitable interest was not attended to.<sup>77</sup> Under the 1786 Act (Imp.), it was possible for a person to obtain an equitable title to a ship, giving him control over her, though insufficient for the purpose of being registered as owner. This gap in the law led to the setting up of trusts of various types in Her Majesty's Dominions. These trusts clandestinely owned and operated British ships for the benefit of foreigners. The 1794 Act (Imp.),<sup>78</sup> as we have seen, was passed to remedy the situation. It categorily provided that neither legal nor equitable interest should pass except in the manner prescribed.<sup>79</sup> The provision regulated all proprietary interests in ships, and clearly stated that "there can be no such a thing as the equitable ownership of a ship."<sup>80</sup>

The far-reaching effects of the system in His Majesty's Dominions as produced by the policy of the two Acts are noteworthy. The non-recognition of equitable interests as a legal weapon to defeat attempts by foreigners to acquire property, of whatever kind in British ships, had untoward implications for British merchants. In Camden v. Anderson,<sup>81</sup> a partnership purchased a ship in the name of one of its partners. His name alone appeared in the register as owner. An action involving an averment of interest in all the partners was brought upon an insurance policy effected on the ship. The decision of the Court of King's Bench and the grounds therefor are somewhat startling. It was held that registration in the name of the person alone was conclusive of his title, both legal and equitable, to the exclusion of the others. It also meant that the others had no insurable interest as well!

In Yallop, Ex parte,<sup>82</sup> the principle was not only upheld but

77. Campbell v. Stein (1818) VI Dow 116, 131, per Eldon, L.C.

78. 34 Geo. III, c. 68.

79. After 1st January, 1795, no transfer, contract or agreement for transfer of property in any ship would be valid in law or equity unless it was made by bill of sale or instrument in writing containing a recital of the registry certificate; ibid., s. 14.

80. Dixon v. Ewart (1817) 3 Mer. 322, 332; see also Thompson v. Smith 1 Madd. 395.

81. (1794) 5 Term Rep. 709.

82. (1808) 15 Ves. Jun. 60.



extended to the prejudice of certain creditors. A firm of two partners, C and H, bought three-fourths of the ship "Euphrates". They paid the shipowner by accepting bills of exchange. Although the shares were joint property and treated in the books as partnership property, they were registered in C's name alone. The acceptances on account of the purchase-money were unpaid to the extent of £12,500. An important issue raised by the petition presented by a joint creditor of C and H was whether the ship was partnership property. Despite the ship being dealt with by the partnership, the court held that registration was evidence of C's property and had to be taken as such even among the partnership's creditors. The effect the decision had on equitable principles is better understood when one refers to the words of Eldon, L.C. He said:<sup>83</sup>

"These two Acts of Parliament (stat. 26 Geo. III c. 60; stat. 34 Geo. III, c. 68) were drawn upon this policy; that it is for the public interest to secure evidence of the title to a ship from her origin to the moment in which you look back to her history...and it is obvious, that, if...the doctrine of implied trust in this court is to be applied, the whole of these Acts may be defeated; as neutrals may have interest in a ship, partly British-owned; and the means of enforcing the Navigation Laws depend upon knowing from time to time who are the owners, and, whether the ship is British-owned and British-built. Upon that the Legislature will not be content with any other evidence than the registry...They go so far as to declare, that notwithstanding any transfer, any sale, or any contract, if the purpose is not executed in the mode and form prescribed by the Act, it shall be void to all intents and purposes."

It is obvious that the thrust of the two early Acts was to strike directly at the root of all trusts, whether they arose by the acts of the parties or by operation of law, e.g. by an implied or resulting trust.<sup>84</sup> The policy for excluding equitable doctrines equally extended to prevent the principle of agency from operating. In "The Frances",<sup>85</sup> the court rejected the argument that one Campbell,

83. Ibid., 66.

84. Houghton Exparte; Grimble Exparte (1810) 17 Ves. Jun. 251, 253, per Eldon, L.C. He confirmed that the legislative intention under the Act (34 Geo. III, c. 68) was to exclude equitable interest in ships.

85. (1820) 2 Dods 420.

endorsed on the registration certificate as partner-owner, was in fact the agent of two other persons. Sir W. Scott said:<sup>86</sup>

"But if this mode be permitted, of substituting the trustee or agent for persons whose names are withdrawn from all notice, I do not see what is to hinder the whole policy of the law from being subverted by the ownership of foreigners, by the substitution of names of British trustees and agents."

The statute (Imp.) of George IV<sup>87</sup> seemed to suggest a relaxing of legislative attitude towards equitable interests. The change, however, was apparent rather than real. For administrative expediency at the ship registries, the maximum number of legal owners at any given time was limited to thirty-two persons.<sup>88</sup> It was feared that this provision could be so construed as to disregard totally the rights of the owners who, but for the maximum number allowed, would have been registered as owners. The rights protected by the proviso were the "equitable title of minors, heirs, legatees, creditors or others exceeding that number" duly represented by any of the registered owners.<sup>89</sup> If an equitable title arose in favour of a foreign creditor, he would be prevented from being registered. But he would be entitled to assign his interest or to the proceeds of the sale thereof.

Despite the above proviso in the 1823 Act (Imp.) the courts had been consistent in continuing to recognize registration as conclusive of ownership. Thus, where the members of a trading partnership were interested in the ship, all their names had to appear on the register. The partnership name could be added although the respective shares, to which the partners were individually entitled, need not be stated. The above development was reached in 1838 in the case of Slater v. Willis.<sup>90</sup> This lopsided approach to property in British ships had given

86. Ibid., 423.

87. (1823) 4 Geo. IV, c. 41. The same could be said in respect of all the subsequent legislation.

88. Ibid., s. 31. This maximum number had continued unchanged under the Merchant Shipping Act 1894 (Imp.), s. 5 (i). Cf. sixty-four persons under the Shipping Registration Act 1981 (Comth.), s. 11 (1) (b).

89. (1823) 4 Geo. IV, c. 41, s. 31; (1825) 6 Geo. IV, c. 110, s. 32; (1833) 3 & 4 Will., c. 55, s. 33; (1845) 8 & 9 Vic. c. 89, s. 36; (1854) 17 & 18 Vic. c. 104, s. 37 (2). A declaration was required by s. 38 (5) that no foreigner had any legal or equitable interest in the ship or any share therein.

90. (1838) 1 Beav. 354.

rise to problems in the middle of the nineteenth century. The system at times opened the door to fraud and injustices.

The general attitude of the courts, as conditioned by legislative policy, was that they were unprepared to rectify or alter a register. A person claiming title and seeking to replace another as legal owner had to discharge a heavy onus before the court would exercise its discretion.<sup>91</sup> It is submitted that a system of law, devoid of equity as its conscience, would lead to undue rigidity, and prejudice unwary innocent merchants. In Follett v. Delany,<sup>92</sup> L.A. & Co. made an arrangement with D to sell him a ship for the sum of £1,800. Although a bill of sale was executed by L.A. & Co. in favour of D, it was not delivered to D because no part of the money was paid. Without the knowledge or consent of the vendors, D took away the bill of sale and had the ship registered in his own name. A few days later D returned the bill of sale, stating that the arrangement was not to be carried out. L.A. & Co., as plaintiffs, sought the court's assistance to have the ship restored to them. The judgment given to D based on a literal application of section 37 of the Act (Imp.)<sup>93</sup> was a flagrant violation of justice. What is shocking is the dangerous precedent set in this case that there "should be no remedy whatever in respect of fraud, however gross, perpetrated with regard to ships."<sup>94</sup> Knight Bruce, V.C., appeared to have accepted the defendant's argument:<sup>95</sup> "The doctrine of courts of equity, that a vendor has a lien in the property sold for unpaid purchase-money, has no application to the sale of ships."

91. See The "Frances" (1820) 2 Dods 420, 424, per Sir W. Scott, supra.

92. (1848) 17 L.J. Ch. 254.

93. (1845) 8 & 9 Vic., c. 89.

94. (1848) 17 L.J. Ch. 254, p. 255, in argument on behalf of the plaintiffs.

95. Ibid., p. 255.

The stance taken by the courts towards registered titles to ships up to 1854 had changed little. In part, the defects of this body of law were compounded by the refusal or unwillingness of the courts to look behind the register. In The Horlock,<sup>96</sup> the action was brought by W, as the registered owner of a ship. Pursuant to a sale agreement, she had been transferred to W under a bill of sale by the previous registered owner Tw. JH, the defendant, alleged that he had never executed any bill of sale in favour of Tw. According to him, if any bill of sale was registered, it was made and registered fraudulently, without his knowledge, consent and authority. The defendant, who had the management of the ship, had not rendered the accounts. Like the Court of Chancery, the Court of Admiralty followed the plain meaning of section 43 of the Merchant Shipping Act 1854 (Imp.). It read:

"No notice of any trust, expressed implied, or constructive, shall be entered in the Register Book, or receivable by the Registrar;...the registered owner of any ship, or share therein, shall have power absolutely to dispose...of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration."

Undoubtedly, the law of consumer protection was on W's side because he was a bona fide purchaser for value, without notice of the fraud. The strength of W's case lay predominantly in Tw's registration, as legal owner and seller, and also in W's own registration as required by the Act (Imp.). Applying the literal meaning of section 43, the court held that W had a "good legal and equitable title". As W's title was deemed "complete" in that sense, there was no basis on which the court could intervene on JH's behalf. The reasons given for the judgment for W further reinforced the legislative object. Sir Robert Phillimore said:<sup>97</sup>

"...in no case would the court inquire into whether a bill of sale, as is alleged in this case, transferring shares has been registered in fraud...but the question which I have to decide...is that assuming the purchaser in this case buying without notice of fraud, for a valuable consideration under this bill of sale, has become possessed of those shares, and also...has put his name upon the register in such a case it is not competent to the court...to look behind the register for the purpose of dispossessing an innocent purchaser, whose name is on the register."

96. (1877) 3 Mar. L.C. 421.

97. Ibid., pp. 423-424.

A logical inference to be drawn regarding the system of ship registration is that a more recently registered owner was protected at the expense of those registered further back in time. Another undesirable effect stemmed from the use of registration by the unscrupulous as an instrument of fraud.

The defects inherent in a policy-oriented system were later alleviated. The change came when the British Parliament modified its dogmatic approach to registered titles.<sup>98</sup> Consequently, the courts were able to exercise jurisdictions which involved looking behind the register.<sup>99</sup>

## V. PASSING OF PROPERTY

It is self-evident that a class of property created by legislation can only be transferred in the way provided by the Parliament. The statute (Imp.) of George III<sup>1</sup> was passed some seven years after the first settlement in New South Wales in 1788. Although in 1794 Port Jackson was not proclaimed a port for the purpose of registering ships, several sections of the statute (Imp.) were of general application and would therefore apply to ship transactions in the colony.<sup>2</sup> The sections introduced certain procedural requirements to be met for the protection of the buyer's interests. By section 15, on transfer of property in a registered ship an endorsement had to be made on the registration certificate, and a copy of the endorsement delivered to authorized persons for registration. Non-compliance rendered the sale, contract or agreement for sale "void to all intents and purposes whatsoever." Where the ship was absent from port at the time when the change in property occurred, registration of the bill of sale and endorsement on the certificate had to be made within

98. I.e., when the Merchant Shipping Act Amendment Act 1862 (Imp.), s. 3, was passed. See also Batthyany v. Bouch (1881) 50 L.J.Q.B. 421. Corresponding provisions are enacted in the Shipping Registration Act 1981 (Comth.), s. 47. These matters are considered in due course.

99. See Chapter Nine on Admiralty Jurisdiction.

1. (1794) 34 Geo. III, c. 68, supra.

2. See e.g., ibid., ss. 11, 12, 14 and 15.

ten days after her return.<sup>3</sup>

In Moss v. Charnock,<sup>4</sup> the Court of King's Bench held that, unless the requisites imposed on the parties were met, no bill of sale or other instrument would be operative or effectual from any antecedent time. The ground of the decision is seen as an aspect of the doctrine of disclosure which underlay the system of registration. "The public would be best secured by holding that no interest shall pass from any owner in British ships to any other until the public has that information...so essential to its commercial welfare."<sup>5</sup> True to the declared policy of the legislature, the Court of King's Bench gave effect to the wording of the Act (Imp.) in the literal sense. However, in the two later cases of Palmer v. Moxon<sup>6</sup> and Ewart v. Dixon,<sup>7</sup> the Court of Common Pleas and the Court of Chancery, respectively, took a somewhat different view of the 1794 Act (Imp.). Both the courts held that property in a ship passed by the bill of sale on its execution.<sup>8</sup> Performance of the requisites as to registration and endorsement was construed as a condition subsequent. Accordingly, non-performance was held to defeat the interest which had vested

3. I.e. to the port to which she belonged: ibid., s. 16.

4. (1802) 2 East 399.

5. Statement of Court of King's Bench in Moss v. Charnock (1802) 2 East 399, referred to by Maule, J., in Boyson v. Gibson (1847) 4 C.B. 121, 147.

6. (1813) 2 M. & S. 43. The correctness of the decision in Moss v. Charnock (1802) 2 East 399 was endorsed. But several of the judges, including Lord Ellenborough, C.J., thought that "some of the expressions used went farther than the case required or the law warranted," ibid., 50 and 52.

7. (1817) 3 Mer. 322. Lord Chancellor Eldon held that endorsement on the registration certificate within ten days of the ship's return to port could be effected by the seller despite his bankruptcy. His view was that the endorsement passed no property: ibid., 334.

8. This position, as adopted in the two cases, was stated by Maule, J., in Boyson v. Gibson (1847) 4 C.B. 121, 147.

by the execution of the bill of sale.<sup>9</sup> Though such construction put upon the Act (Imp.) was in the main regarded as correct, it was grossly out of line with the legislative objective.

To rectify the error - it is interesting to note that - two succeeding Registration Acts (Imp.), i.e. the Act passed in the reign of George IV<sup>10</sup> and the one passed in the reign of William IV,<sup>11</sup> abandoned the language of the 1794 Act (Imp.). In relation to a single buyer, the condition subsequent to be fulfilled by endorsement on the registration certificate was repealed. In enacting the two Acts, the legislature had adopted the same words as those which the Court of King's Bench in Moss v. Charnock<sup>12</sup> had used in the construction placed upon section 14 of the 1794 Act (Imp.). In making the title of a purchaser of a ship or any share therein dependent on registration alone, the two Acts were promoting the principle of public record. Registration was a formal act which the purchaser could procure to be done by the public officers who were bound to make the entry on his application. The interests of the public would be better served because the registration, when made, would be open to inspection by all.

In the event of a shipowner's bankruptcy, the competing claims of the purchaser and the assignees were determined according to whether or not the bill of sale was registered. In Boyson and Another v. Gibson and Others,<sup>13</sup> a British ship registered under the Act (Imp.) of William IV<sup>14</sup> was conveyed by her owner for valuable consideration to B. The bill of sale was executed before, but was not registered until after, the owner's bankruptcy occurred. It was held that, due

9. In Hubbard v. Johnstone (1810) 3 Taunt 178, it was held by five judges against two that property in a ship would vest in a purchaser instantly on the execution of a bill of sale. However, non-compliance with the registration Acts was held to render the purchaser's title defeasible.

10. (1825) 6 Geo. IV, c. 110, s. 37.

11. (1833) 3 & 4 Will. IV, c. 55, s. 34.

12. (1802) 2 East 399, supra.

13. (1847) 4 C.B. 121.

14. (1833) 3 & 4 Will. IV, c. 55.

to B's delay in securing registration, property in the ship had passed to her owner's assignees.<sup>15</sup> Maule, J., said:<sup>16</sup>

"The true effect of the enactments appears to be, that, until registration, every disposition by the act of the vendor, or of the law, is as effectual as if the unregistered deed had not existed, and is not defeated by the subsequent registration - whether such intermediate disposition be one which requires registration and is registered, or does not require it, and is not registered."

The whole effect of the Act (Imp.) as to registration seems to be this: it is the registration, and not the execution of the bill of sale, from which its operation commenced. Apparently, the registration, when made, would operate on any interest or property right which the party making the transfer had at the time.<sup>17</sup> This seemingly harsh decision could be further explained. Property rights in registered ships were of a statutory nature. Minor exceptions aside, it has been an express legislative object to treat every business dealing affecting titles or rights to ships as matters within the system. Often the underlying rules were too rigid to permit any technical departure or procedural omission by purchasers. Moreover, under the system the registry officers were not empowered to take into consideration the special circumstances and/or the merits of any case so as to waive some of the statutory provisions.

Besides being an element of policy, registration of a transfer by bill of sale constituted public notice. It behoved a prospective purchaser to inspect first the register book at the ship's registration office. The register book would show at any given time whether any transactions affecting the ship had been entered. The absence of an entry was, however, no indication that no sale had in fact occurred. This risk factor together with the unrestricted time period allowed for effecting a registration became a pitfall for British merchants and financiers. It would be easy for an unscrupulous

15. The reason was that the ship did not pass to the purchaser as his property because it was deemed to remain in the bankrupt's order and disposition.

16. (1845) 4 C.B. 121, 145.

17. Ibid., 148.



shipowner (S) to conspire with another person (O) to defraud an innocent buyer (B). For example, S could transfer by bill of sale or other instrument the property to O, who would deliberately postpone the registration. S could later execute another transfer of the same ship to B in such a way that O could secure registration ahead of B. Even in the absence of any conspiracy between S and O, B would still be disadvantaged. As B had obtained no property in the ship, his personal claims against S might yield no satisfaction, if the latter was insolvent. The rigid approach to registered titles coupled with the lack of jurisdiction on the part of the Court of Chancery to intervene<sup>18</sup> were matters of grave concern.

On the other hand, due to a purchaser's insolvency or failure to tender payment, a seller would be compelled to transfer his ship or shares therein to another person. The bill of sale or instrument executed in favour of the first purchaser, who was guilty of default, could have been registered. A change in the legislative policy was necessary to protect the rights of shipowners and the position of bona fide purchasers for value. The difficulty was ingeniously removed. By section 39 of the 1825 Act (Imp.),<sup>19</sup> subject to the interval of thirty days apart,<sup>20</sup> two or more bills of sale or instruments relating to the same ship or shares therein could be entered in the register. Within thirty days after the registration, an endorsement had to be made on the ship-registration certificate. Since a shipowner had possession of the ship-registration certificate, the requirement enabled him to pass a good title to the proper purchaser. If, on the expiration of the thirty-day period, no such endorsement was made, an endorsement could be made in favour of a subsequent purchaser,

18. See the Merchant Shipping Act Amendment Act 1862 (Imp.), s. 3 and Batthyany v. Bouch (1881) 50 L.J.Q.B. 421.

19. (1825) 6 Geo. IV, c. 110.

20. I.e. thirty days after the bill of sale or instrument was entered in the register, or after the ship's return to the port to which she belonged.

who produced the ship registration certificate to the Collector and Comptroller for the purpose.<sup>21</sup>

The above method of determining the order of priority was discarded about two decades later. Under the Merchant Shipping Acts (Imp.) of 1854 and 1894, a different approach to the problems was adopted. The courts were given wider admiralty jurisdiction by legislation to adjudicate upon competing claims to property in ships, and also other matters relating thereto.<sup>22</sup> As a reforming measure, the Parliaments in the United Kingdom and Australia tend to enlarge the admiralty jurisdiction of the courts.

The endorsement procedure is seen as a furtherance of the legislative policy. As a logical extension of the register, the ship-registration certificate was required to bear the personal particulars of the new owners. For reasons of security and entitlement to the privileges enjoyed by a British ship, the information was essential, especially where the ship was plying outside her home port.<sup>23</sup> It is interesting to note that the doctrine of "owner" identification has been consistently adhered to under the Merchant Shipping Act 1894 (Imp.)<sup>24</sup> and by the Commonwealth under the Shipping Registration Act 1981 (Comth.).<sup>25</sup>

21. (1825) 6 Geo. IV, c. 110, s. 39; (1833), 4 Will. IV, c. 55, s. 36. Provisions were introduced authorising endorsements to be made on the registration certificate at a port other than the one where the ship was registered: s. 40 of the 1825 Act (Imp.) and s. 37 of the 1833 Act (Imp.).

22. To be considered in due course.

23. Under the Merchant Shipping Act 1854 (17 & 18 Vic., c. 104) when a change in ownership occurred, an endorsement on the registration certificate had to be made: s. 45.

24. (1894) 57 & 58 Vic., c. 60, s. 20.

25. No. 8 of 1981, s. 24.

## VI. MISCELLANEOUS EXCEPTIONS

We have seen the system of registration which operated to vest in a purchaser the legal and equitable title to a ship or the shares therein. The cases which fall outside its scope will be considered.

### 1. Registration short of Ownership

Despite the registration, a purchaser does not acquire any title unless the bill of sale is validly executed. This exception is an aspect of the legislative policy, which is explained in Orr v. Dickinson.<sup>26</sup> As owner of the "Polly Hopkins" registered at Prince Edward's island, the plaintiff executed a certificate of sale in statutory form, authorising M'Claman to sell her for £1300. By way of conditional sale, M'Claman executed a bill of sale of the brig to D for £900. The Registrar at the Liverpool Customs House registered D as owner only after the amount had been changed to £1300. When the bill of sale was executed, M'Claman had become insolvent. Moreover, the registration was mistakenly effected after notice of revocation of the power of attorney, previously given to M'Claman, was received. In the action brought against M'Claman and D, the plaintiff alleged, inter alia, that no bona fide sale of the brig had taken place. Reference was made to section 81 of the Merchant Shipping Act 1854 (Imp.) which required certain rules to be observed to as certificates of sale.

The court found that the power was not exercised according to the directions contained in the certificate. It took the view that the bill of sale, though purporting to be good so that the Registrar was obliged to register D as owner, was in fact a nullity. No property in the vessel would therefore pass. The attempted exercise of the power was ultra vires. Wood, V.C., said:<sup>27</sup>

"...I can find nothing in the principle of national policy, which requires that registration shall give operation to that which is a nullity...the registration was an irregular registration in every sense of the word; and that according to the 12th rule of section 81, no sale having been made

26. (1859) 28 L.J. Ch. (N.S.) 516.

27. Ibid., p. 520.

in conformity with the certificate of sale, the certificate ought to be cancelled."

Entry in the register is no absolute guarantee of title. This fact and the absence of provisions on the matter in the Merchant Shipping Act 1854 (Imp.) will not deter the court from holding that a person, who has no authority, cannot confer a valid title on another. In Holdernness v. Lamport,<sup>28</sup> for valuable consideration JH sold to the plaintiffs TH three ships, including the Flora M'Ivor. JH having become bankrupt, his assignees claimed the ships on the ground they were in his order and disposition. In Holdernness v. Rankin,<sup>29</sup> a suit instituted by TH, it was held that he was entitled to the ships as purchaser. However, the assignees had considered themselves entitled to the ships. They had allowed WM to take the Flora M'Ivor in satisfaction of a large sum of money owed by JH. Consequently, WM became registered as owner of the ship and had possession of her. The judgment given for TH shows that, on the facts of the case, registration alone did not confer an indefeasible title on a person. Moreover, the contention that, without fraud or criminality, the name of WM had been entered on the register had no overriding force. In ordering that the ship and her possession be restored to TH, the court was in fact exercising some new power. Romilly, M.R., said:<sup>30</sup>

"There must, however, be jurisdiction somewhere to enable the rightful owner to obtain a transfer of the ship on the registry, and possession of the property...But if the [Act] does not provide a remedy, the jurisdiction must rest in this court."

The above rule equally applied where an unauthorised sale was made overseas by the ship's master who happened to have the same name as the shipowner. Both their names appeared on the registration certificate. Good faith and valuable consideration of the buyer, followed by the necessary registration in his name, were insufficient. This was because of the fraud and forgery committed by the seller.<sup>31</sup>

28. (1860-1861) 30 L.J. Ch. (N.S.) 489.

29. (1860) 28 Beav. 180; 29 Law J., Rep. (N.S.) Chanc. 753.

30. (1860-1861) 30 L.J. Ch. (N.S.) 489, p. 490.

31. The Empress (1856) Swab 160; 166 E.R. 1073.

The court also intervened in other dealings which presented a prima facie appearance of fraud. For example, in Armstrong v. Armstrong (No. 1)<sup>32</sup> between the date of the bill of sale relating to certain shares in a ship and the entry of the transfer in the register, the purchaser had notice that the vendor was not the owner. Actually those shares were registered in the name of the vendor who held them as trustee. An interim injunction was granted to restrain the purchaser from dealing with the shares until the hearing of the case.

The effect of a person's name remaining on the register was considered from the viewpoint of his liability for ship repairs. In Young v. Alexander and Dunbar,<sup>33</sup> a ship was sold. For the period of one month, the buyer omitted to deliver to the ship registry a copy of the endorsement of transfer on the registration certificate. By the statute of George III,<sup>34</sup> non-compliance with the statutory requirement would render the sale or contract "to be utterly null and void to all intents and purposes whatsoever." While the sellers, who were sued, were legal owners on the face of the register, repairs were done on the ship. The court ingeniously got round the difficulty of disregarding the legal title of the sellers by relying on a common law rule. Lord Ellenborough, C.J., gave judgment for the defendants on the ground that, as the repairs were ordered by the buyer, there was "no privity of interest between him and the defendants."<sup>35</sup>

The above decision supports the inference that registration was not always conclusive of the personal liability of the shipowner. Legal and equitable interests in, or rights to, ships or shares therein were the concern of the system of registration. Registration certificates had no relevance to matters outside the system. Thus in a common law action against a shipowner to recover repair costs or collision damage, the plaintiff had to establish the former's ownership by evidence other than the registration of the ship in his name.

32. (1854) 21 Beav. 71.

33. (1806) 8 East 10.

34. (1794) 34 Geo. III, c. 68, s. 15, supra. This requirement was discarded in (1823) 4 Geo. IV, c. 41, and subsequent Acts (Imp).

35. (1806) 8 East 10, 13.

This point was borne out in Cooper and Another v. South, Briggs, Smith, Banks, Watson and Ruder.<sup>36</sup> The plaintiff brought an action in tort for damage negligently caused to his boat by the brig. On the brig's certificate of registration, the names of the six defendants were stated as her owners. In a surprising decision, Mansfield, C.J., held that the registration certificate "obtained on the affidavit of two owners was insufficient to charge the rest." He ordered a non-suit against all of them.

## 2. Other Modes of Acquiring Title or Rights

It is obvious that registration as provided by the Acts is not the only method of obtaining a legal title or right to a ship or the shares therein. We shall examine the exceptions and the grounds therefor.

Ships belonging to Her Majesty, though used solely for trading purposes, are not registered in the usual way. Except otherwise provided, section 741 of the Merchant Shipping Act, 1894 (Imp.) renders the Act inapplicable to Her Majesty's ships. In relation to Her Majesty's ships and ships owned by Her Governments, the concept of registration was implemented principally to secure the benefits of the limitation of liability. The 1894 Act (Imp.) operates generally in her Majesty's Dominions. In New South Wales, the first Australian colony,<sup>37</sup> and later the Commonwealth,<sup>38</sup> the Crown was under a liability to compensate victims of tortious damage. Section 80 (1) of the Merchant Shipping Act 1906 (Imp.) reads:

"Her Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and these Acts...either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with those regulations as if they were registered in the manner provided by those Acts."

36. (1813) 4 Taunt 803; 128 E.R. 547.

37. See Farnell v. Bowman (1887) 12 App. Cas. 643; under the (1876) Act 39 Vic. No. 38 (N.S.W.) the colonial government was suable in tort.

38. Claims Against The Commonwealth Act (Comth.) (No. 21 of 1902) which was replaced by Judiciary Act (Comth.), (No. 6 of 1903), Part IX, ss. 56-57.

Pursuant to section 80 (1), an Order in Council was enacted.<sup>39</sup> It prescribed the manner in which ships belonging to the Government of the Commonwealth might be registered. Under the Order, the permanent Head of the Department in respect of which the ship should be registered was the person appointed to carry out the duty and exercise rights arising under the 1894 Act (Imp.). In the Commonwealth of Australia v. Asiatic Steam Navigation Company Ltd.,<sup>40</sup> The "River Loddon", a trading ship owned by the Australian Government, negligently collided with the steamship Shadzada. The former ship was registered under the Order in accordance with section 80 (1) of the 1906 Act (Imp.), and the collision arose without the actual fault or privity of her owners. In this action, the High Court of Australia had to determine whether section 503 of the 1894 Act (Imp.) applied to limit the liability of the Commonwealth as plaintiffs. The judgment of Taylor, J., for the plaintiffs was affirmed on appeal.<sup>41</sup> Dixon, C.J., McTiernan and Williams, J J., said:<sup>42</sup>

"The purpose of the words [i.e. of section 80 of the 1906 Act] is to say that although the Government ship is not registered in conformity with the Act, the provisions of the Act shall apply to it as if it were, that is to say as if its registration is in pursuance of an order in council ...What seems to be its concern [i.e. section 80] is to undo the effects of s. 741 where there is an order in council and registration of a Government ship and to undo it notwithstanding that registration is not in accord with the Act of 1894."

There are two broad categories of cases where title to property in ships or shares therein is not based on the Registration Acts. These situations arise as a result of the operation of law. Title to the property is vested in the personal representatives on the death, or in the trustee-in-bankruptcy on the bankruptcy, of the shipowner. In delivering the judgment in Robinson v. Macdonnell, Lord Ellenborough

39. S.R. & O., No. 1391 of 1924, p. 658.

40. [1955] 1 Lloyd's Rep. 503.

41. See (1955-1956) 96 C.L.R. 397.

42. Ibid., p. 420.

said:<sup>43</sup>

"In these cases, a title may be transmitted without any of the forms required by the statutes...."

For further exceptions, it is worth considering whether any rights could accrue to a non-registered owner. In Sutton v. Buck,<sup>44</sup> the plaintiff bought and paid for a ship stranded on the English coast. The transfer was void by the Imperial Acts on the ground that it was not regular and not registered. However, possession of the ship had been delivered to the plaintiff. Mansfield, C.J., held that, despite the non-registration, the plaintiff's possession enabled him to maintain an action of trover against another person taking possession of the wreck.

Long uninterrupted possession, aided by other considerations, may operate to cure a defective title. In The "Molly",<sup>45</sup> the ship owned by a British subject was captured by a Frenchman. After proceedings alleged to have been regularly conducted before the Conseil des Prises at Paris, she was bought by a Spanish proprietor. At the time when the ship was captured, Spain was in a state of neutrality. Later she signed a treaty of peace with Britain. The ship, while in the River Thames, was seized under a warrant of arrest issued by the High Court of Admiralty. Judgment was given for the Spanish proprietor primarily on the ground that he had had uninterrupted possession of her for ten years. Although the law fixed no particular period of time after which possession should not be disturbed, Sir W. Scott took the view that it was highly reasonable that there should in practice be some such limitation. He said:<sup>46</sup>

"[A] title which may have been originally faulty, must of necessity become unimpeachable by great lapse of time. It is to be remembered, likewise, that this title stands upon a sale to a neutral, and is upon that account to be treated with a greater degree of tenderness."

43. 5 Maule & Selw. 228, p. 239; followed by Dallas, C.J., in Monkhouse, Wright and Fairbairn v. Hay (1820) 8 Price 256, 279. It was there held that the Registry Acts requiring ships to be registered in the owner's name did not affect the provisions of s. 11 of chapter 19 of 21 Jac. 1, as regards the effects of reputed ownership of goods and chattels. The Registry Acts referred to were 26 Geo. III, c. 60 and 34 Geo. III, c. 68.

44. (1810) 2 Taunt 302; 127 E.R. 1094.

45. (1814) 1 Dodds 394; 165 E.R. 1354.

46. Ibid., 395.



## VII. MORTGAGE

### 1. Early Law

It may be recalled that the statute (Imp.) of William III required English-owned ships to be registered before they were entitled to trade in Her Majesty's plantations in America.<sup>47</sup> The statute contained no provision for ship mortgage. This shortcoming, however, did not deter shipowners and financiers from entering into legally enforceable transactions. Financiers and creditors could take advantage of section 21. Before two witnesses, their names could be endorsed as purchasers on the ship-registration certificate. Undoubtedly the mortgage deed would provide that on discharge of the debt the ship was to be re-transferred to her original owners. Similarly in an equitable mortgage, when the debt was paid to the creditor, he could be compelled in a court of equity to re-assign his interest in the ship to her owner.<sup>48</sup> The immense benefits enjoyed by English-registered ships<sup>49</sup> and the substantial encouragement for navigation given by the British Parliament<sup>50</sup> would attract foreign capital into the country. No law prohibited money being furnished by foreigners for purchasing ships to be registered officially in the names of English subjects. By express provisions in agreements and the operation of implied trusts, the ships bought were deemed to be the property of foreigners.<sup>51</sup> Alternatively, the agreements could provide that the ships were fully mortgaged to them for loans advanced. By different contrivances and arrangements, foreigners would indirectly

47. (1696) 7 & 8 Will. III, c. 22, s. 17.

48. E.g. in Gardner v. Czenove and Another (1856) 26 L.J. (N.S.) 17, it was held that, although the assignment was absolute in terms, it was intended as security; see also The Union Bank of London v. Lenanton (1878) 47 L.J. (N.S.) 409.

49. Supra.

50. See e.g. (1787) 27 Geo. III, c. 19; (1794) 34 Geo. III, c. 68; (1834) 4 & 5 Will. IV, c. 52; (1835) 5 & 6 Will. IV, c. 24.

51. The principle of implied trust applies to both real property and personalty: Ebrand v. Dancer (1680) 2 Ch. Cas. 26; Ex parte Houghton (1810) 17 Ves. 253. In fact the Statute of Frauds 1677 (Imp.) 29 Car. II, c. 3 did not apply to the creation or the operation of implied or resulting trusts. Therefore it was unnecessary that there should be any evidence in writing of the intention of the person providing the purchase-money. The payment giving rise to such trusts could be proved by parol.

acquire the use, benefit and control of English-registered ships.<sup>52</sup>

The 1696 Act (Imp.) left many gaps in the law. Often ships and shares therein could be so encumbered in favour of different creditors as to be worthless. There were no prescribed forms or instruments to be used when ships or shares therein were used as mortgage security.

The 1786 Act (Imp.) was a bold legislative move to meet the problems. It was designed with two distinct aims in mind. Firstly, the Imperial Parliament pursued the policy of requiring shipowners, who applied for a registration certificate, to disclose by oath, inter alia, their entire interests in the ship. The oath also declared that "no other person or persons whatsoever has or have any right, title, interest, share or property therein."<sup>53</sup> This section placed on the applicants an onus of making sure that they were the absolute owners. Thus before taking the oath,<sup>54</sup> shipowners would have to obtain from mortgagees full release of their rights and claims against the ship or shares therein. This statutory process guaranteed the existence of an unencumbered title to a ship or the shares therein. After the registration, however, there was nothing to prevent shipowners from using the property as security for loans.

Secondly, the legislature sought to exclude foreigners from holding shares or having a proprietary interest in British ships. This legislative goal has remained an outstanding feature of the system of registration down to the present day.<sup>55</sup> In the early phase, the legislators were so committed to the national policy that no distinction was drawn between the rights and interests of mortgagees and those of shipowners. Probably one fear was that foreign

52. One real danger was that the ship being in the possession, order and disposition of reputed English owners could be subject to the payment of debts when they became bankrupt: (1623) 21 Jac. 1, c. 19, s. 11.

53. 26 Geo. III, c. 60, s. 10.

54. As to penalty for taking oath falsely, see ibid., s. 41.

55. (1854) 17 & 18 Vic., c. 104, s. 18; (1894) 57 & 58 Vic., c. 60, s. 1.

mortgagees could have the use, benefit, control or management of the ship, or part thereof, particularly in time of war. Seen in this light, the purpose of section 15 is clear.<sup>56</sup> It provided that if a foreigner or any person for "his use or benefit shall purchase or otherwise become entitled to the whole, or any part or share of or any interest in such ship" the registration certificate had to be delivered up to the authorised person. The wording seemed wide enough to include any contractual rights, legal interest and title acquired by foreigners. Apparently, it would extend to rights derived by foreigners as beneficiaries under a will or as intestate successors. It is, however, evident that not all types of interest that could be created over a British ship or shares therein in favour of foreigners could be effectively excluded.

Where a foreigner's interest in, or right to, any British ship arose when the ship was in port, the shipowners had seven days in which to deliver up the registration certificate. Obviously, if such interest or rights were created when the ship was on the high seas or at a foreign port, the time period allowed would be longer. Within the statutory period of seven days, or a longer period allowed, it was possible for a mortgage to be created in favour of a foreigner and also discharged. It would be reasonable to presume that the legislature did not consider that its object would be defeated by such short-term transactions. In practice, shipowners and financiers had little difficulty in circumventing section 15. A sale or mortgage agreement could be entered into with the date left blank. To avoid interfering with the use of the ship, which would arise when the registration certificate was delivered up, a creditor would insert a suitable date in the agreement only when the shipowner defaulted.<sup>57</sup>

The shares or interests involved would then be put up for sale, usually to British subjects. In this way, foreigners could actually acquire, but were prohibited from retaining, property in British ships. Since foreigners were entitled to be paid out of the proceeds of the sale, their financial interests were generally secured.

56. 26 Geo. III, c. 60.

57. There would be an understanding to this effect between the two parties.

It may be recalled that for the purpose of determining competing claims preference was given for registered title over equitable interests.<sup>58</sup> However the Court of Chancery exercised its wide jurisdiction to protect equitable mortgagees from the effects of the bankruptcy legislation of James I.<sup>59</sup> In Ex. Parte Matthews,<sup>60</sup> a ship while at sea was mortgaged. Hardwicke, L.C., held that it would be outside the scope of the statute of James I if the mortgagee took all the steps in his power to obtain possession of the bill of sale.<sup>61</sup> The doctrine of possession by equitable mortgagees was similarly applied in the late eighteenth century. Thus in Ex. parte Batson and Others,<sup>62</sup> G and C assigned to L & Co. the ship Nautilus, together with all deeds, as security for the repayment of various sums of money. Under a second mortgage, L & Co. assigned the ship to P & Co. Bankruptcy commission was issued in October, 1783, against G and C and L & Co. In April, 1784, P & Co. took possession of the ship. Thurlow, L.C., gave judgment for P & Co. on the ground that their possession had taken the ship out of the statute of James I.

We have seen that the 1794 Act<sup>63</sup> was passed to extend the policy of maintaining public records of all transactions affecting British ships in Her Majesty's Dominions. No transfer of property in any ship, whether as mortgage security or otherwise, was valid in law or equity unless the statutory conditions laid down were satisfied.<sup>64</sup> The object was to ensure that dealings affecting British ships, the interests created therein and the persons entitled to them, appeared on official records.<sup>65</sup> It was part of the doctrine of disclosure strictly implemented by the British Parliament. In Hibbert v. Rolleston, Thurlow, L.C., said:<sup>66</sup>

58. Yallop, Ex parte (1808) 15 Ves. Jun. 60, 66, supra.

59. (1623) 21 Jac. 1, c. 19, s. 11.

60. (1751) 2 Ves. Sen. 272.

61. Following the decision in Brown v. Heathcote (1746) 1 Atk. 160. The view was expressed that the case would be decided differently if under the circumstances the ship was allowed to come back and go on another voyage.

62. (1791) 3 Bro. C.C. 363.

63. 34 Geo. III, c. 68.

64. Ibid., s. 14.

65. Ibid., s. 15.

66. (1792) 3 Bro. C.C. 571, 576.

"It has been long quite settled, that if the requisites in the Navigation or Ship Registry have not been complied with, the assertion of any equitable right or title to the vessel will be utterly unavailing."

Unfortunately, in solving some pressing problems, the Act had given rise to new ones. The confidence of charterers and financial institutions in dealing with shipowners was short-lived. Often the information shown on public records concerning dealings in ships was not up-to-date. Unscrupulous shipowners could mortgage or transfer the same ship to different persons by executing a number of bills of sale. Naturally not all the purchasers were able to meet the statutory requirements at the same time, since the registration certificate would only be available for endorsement on the ship's return.<sup>67</sup> Purchasers and mortgagees who were victims of fraud would seek redress from the courts. Unfortunately, the situation had been complicated by a number of unjust decisions. The "court will not interfere in such instances, even where the other parties have been guilty of fraud."<sup>68</sup>

## 2. Modern Aspects of Ship Security

For the first time in history, legislation was introduced to provide expressly for ship mortgages. In keeping with the policy, the Act (Imp.) of George IV passed in 1823<sup>69</sup> required disclosure of every mortgage. The transaction, when duly entered in the register book and endorsed on the registration certificate by the Collector and Comptroller, would protect the mortgagee against the subsequent bankruptcy of the shipowners or mortgagors. In essence, the provision was a remarkable breakthrough after thirteen decades of legislative effort. It made a logical distinction between the rights of shipowners and those of mortgagees. The statutory protection conferred on mortgagees paved the way for new sources of finance for shipowners. It appeared that foreigners could be registered merely as mortgagees. If our view is correct, the change in legislative attitude

67. There was some authority for the view that a bill of sale relating to a ship at sea passed the absolute property. However, it would be divested in the event that the pre-requisites prescribed by the Act were not met on the ship's return: Mestair v. Gillespie (1804-1805) 11 Ves. Jun. 622; Dixon v. Ewart (1817) 3 Mer. 322, supra.

68. Thomas v. Leake 1 Mad. Rep., 395 et. seq.; cited with approval in Hibbert v. Rolleston (1792) 3 Bro. C.C. 571, 576; Follett v. Delany (1848) 17 L.J. Ch. 254, p. 255, supra.

69. 4 Geo. III, c. 41, s. 37.

would enable many shipowners to benefit from foreign investments. Moreover, under the provision, ships and shares therein could be assigned as security to trustees who were empowered to sell the same and pay the proceeds to creditors. To British shipowners throughout the Empire, the new approach signalled the beginning of a new era of owning and operating ships.

Some major problems were presented by the competing claims which arose from the mortgage of the same ship or shares therein to different creditors. It had been totally left out of legislative purview whether they were to rank pari passu or in some other order of preference. A determined effort was made by the 1825 Act (Imp.)<sup>70</sup> to fill the gaps in the law. The new provisions were in line with, and in a way strengthened the doctrine of disclosure. While owners of ships or shares therein were at liberty to mortgage them any number of times they wished, the mechanisms for protecting the rights of creditors were clearly spelt out. Also, as a matter of fair play, it was possible for intending purchasers and financiers to obtain from public records information about transactions affecting a ship or any shares therein. These factors seemed to have motivated the legislators in enacting the provisions.

By section 38, transfer of property in a ship was effected by the entry in the register book of the particulars of the relevant bill of sale. A transferee as mortgagee was protected "as against all and every person and persons whatsoever, and to all intents and purposes." However, the property transferred would be divested in favour of subsequent mortgages who obtained an indorsement on the registration certificate as provided.<sup>71</sup> Accordingly, where an entry was made in the register book, thirty days had to elapse before entry of the particulars of another bill of sale could be made. If the first entry was made when the ship was away from her home port, the period of thirty days would count from the day of her return. The same

70. 6 Geo. IV, c. 110.

71. Ibid., s 39. A similar view was previously put forward by Lord Eldon in Dixon v. Ewart (1817) 3 Mer., 322, 333, supra.

rule as to entry applied to subsequent transfers. Suppose that at a given time two entries concerning the same ship were made in favour of two different persons. Issues as to priority were determined by an objective procedure. Where an entry was made when the ship was at sea, the Collector and Comptroller was required to make the endorsement on the registration certificate when it was produced to him within thirty days of the ship's return to port. In the case of an entry made when the ship was at port, the endorsement could be made within thirty days thereof. If, within either of those periods, the registration certificate was not produced, the Collector and Comptroller was obliged to make an endorsement on the certificate in favour of the person who first produced it. As between two competing mortgagees, the order of priority was determined according to the time when the endorsement, as a public act, was made on the registration certificate. By the proviso, the Commissioners of Her Majesty's Customs were empowered to grant a time extension where the certificate was proved to have been lost, mislaid or detained.<sup>72</sup>

In Ex parte Jones,<sup>73</sup> the scope of section 39 was considered. Two mortgages were created over the ships. The later mortgage contained a recital of and was subject to the earlier one. It was the court's view that the period of thirty days did not apply to the second mortgage. The reason given was that, since the second mortgage was not in competition with the first, it could be entered in the register book regardless of the statutory period.

The endorsement provision was also applied in resolving conflict between the equitable rights of mortgagees and the legal rights of shipowners in bankruptcy. In Campbell v. Thompson,<sup>74</sup> a mortgagee omitted to procure an endorsement of the bill of sale particulars on the registration certificate as required by the statute of William IV.<sup>75</sup> After the expiration of thirty days, the shipowner became bankrupt. The plaintiff, as mortgagee, sought to restrain the assignees in bankruptcy from selling the shares. The motion, however, was refused

72. (1825) 6 Geo. IV, c. 110, s. 39.

73. (1832) 2 C. & J. 513.

74. (1842) 2 Hare 140.

75. (1833) 3 & 4 Will. IV, c., 55, s. 36 ; i.e. within 30 days after ship's return to port.

on the ground that there was no equity to restrain the sale. Sir James Wigram, L.C., held that on the shipowner's bankruptcy the legal title passed to the assignees. This was because under the rule of the law the shares were deemed to be subject to the order and disposition of the bankrupt.

It is noteworthy that the modern aspects of mortgage law had been worked out. By the 1833 Act (Imp.) further prominence was given to the acts of the Collectors and comptrollers, and to the records kept by them at the ship registries. No bill of sale was valid to pass property in a ship or any share therein unless it was actually produced to the Collector and Comptroller, and the particulars of the mortgagor and mortgagee were entered in the register book.<sup>76</sup> These requirements emphasised the thrust of the policy requiring public disclosure of dealings affecting ships. The Collector and Comptroller of every port was given new power to endorse bill of sale particulars on the registration certificate of a ship, although she was registered in another port.<sup>77</sup> Inquirers were authorised to examine and take copies of any oath or declaration made by shipowners and any entry made in the register books. Moreover, true copies of such oath or declaration and entry made in the register books were admissible as evidence in court proceedings.<sup>78</sup>

The statutory provisions completed vital links between the registration system as a whole and the law of evidence. This development gave the role of the Collectors and Comptrollers and the records maintained by them an enhanced importance.

Once the framework of the mortgage law was worked out, the anachronisms were quickly shed. The courts were able to develop appropriate rules to give effect to the rights of mortgagees. In Cato v. Irving,<sup>79</sup> a ship was registered in Liverpool in the names of A and B as owners of different shares. In October, 1849, A executed

76. Ibid., s. 34.

77. Ibid., s. 37; the practice was continued by succeeding legislation for some time.

78. Ibid., s. 40; (1845) 8 & 9 Vic., c. 89, s. 43. Similar provisions have been faithfully reproduced in (1854) 17 & 18 Vic., c. 104, s. 107; (1894) 57 & 58 Vic., c. 60, ss. 64 and 717.

79. (1851-1852) 21 L.J. Ch. (N.S.) 675.



a power of attorney authorising B to sell his shares. By a mortgage deed, which was registered in Liverpool, A mortgaged his shares in the ship and freight to C in November. Under the power of attorney as to A's shares, B sold the ship in Sydney to D who was ignorant of the earlier mortgage. The old registration certificate was given up and the ship was registered de novo in D's name at Sydney. When the ship laden with cargo put into the London Docks in February 1851, both C and D took possession of her, claiming rights in the ship and freight. Parker, V.C., held that the earlier mortgage "was good against" D who had purchased the ship subject to the rights of C, as mortgagee. The case authorities were applied to the effect that mortgagees who take possession before the conclusion of a voyage are entitled to the freight then accruing. In giving judgment for C, he said:<sup>80</sup>

"I consider that a mortgagee who takes possession before the cargo is delivered comes within the rule... The declaration must be, that the plaintiffs are entitled to forty-eight sixty-fourth parts of the ship and forty-eight sixty-fourth parts of net freight (after allowing to Murnin his expenses) to an amount not exceeding the sum due to [C] for principal, interests, and costs."

The decision nevertheless brings to light some glaring defects in the legislation. The ease with which a ship could be transferred out of a British registry to another registry, could in some cases defeat the rights of pre-existing mortgagees.<sup>81</sup> In cases where the old registration certificate had been given up, the rule conferring priority according to the date of endorsement made on the certificate would work hardship and injustice.<sup>82</sup> The registration system and its administering officials could not monitor the method used by shipowners at any given time to dispose of their ship or shares therein. Undoubtedly, the principle of the decision in Cato v. Irving<sup>83</sup> was correct. Unfortunately, in view of the deceitful acts of the shipowner, the case authority would open the door to fraud against overseas mortgagees and purchasers.

80. Ibid., pp. 676-677; Dixon v. Ewart (1817) 3 Mer. 322 cited in support of C's claim.

81. See, however, Act (1845) 8 & 9 Vic., c. 89, s. 39, which afforded some protection.

82. It is questionable whether an endorsement on a registration certificate before it was delivered up would be valid where the ship was at the same time registered de novo at a different port.

83. (1851-1852) 21 L.J. Ch. (N.S.) 675, supra.

The Merchant Shipping Act (Imp.) 1854 was passed to deal with the problems identified above. A number of improvements were made to the registration system. Each of the registries was constituted the sole authoritative repository of all the documents and information relating to transactions affecting ships registered there. A registration certificate after issue was not available for inspection at the ship's registry as to any possible endorsement. A different method for fixing the order of priority among competing claimants was introduced. Accordingly, where two or more mortgages of the same ship or shares therein were executed, their order of ranking would depend on the date of registration.<sup>84</sup> The dates when the mortgages were executed were irrelevant.<sup>85</sup> A historic extension of the role of the registries was the introduction and use of mortgage and sale certificates. A person, who intended to sell or mortgage his ship or shares therein outside the country, where she was registered, could apply to the Registrar for the issue of a relevant certificate.<sup>86</sup> The certificate was in statutory form, containing information essential for the protection of overseas mortgagees and purchasers.<sup>87</sup> A mortgage, when duly endorsed on the certificate by a Registrar or British consular officer according to the terms and directions stated, was protected in the same way as a mortgage duly registered in the ship's registry. For the purpose of the order of ranking, the date of endorsement was regarded as the date of registration.<sup>88</sup> Thus the same rule as to the order of priority applied to "certificate endorsed" mortgage and "registered" mortgage.<sup>89</sup>

84. 17 & 18 Vic., c. 104, s. 69. An important policy provision is found in s. 70, which provided that a mortgagee was not deemed to be the owner of the ship or any share therein.

85. (1854) 17 & 18 Vic., c. 104, s. 69; re-enacted as Merchant Shipping Act 1894 (Imp.), s. 33. See Shipping Registration Act 1981 (Comth.), s. 39.

86. Ibid., ss. 76 and 77; re-enacted in 1894 Act, ss. 39 and 40; no corresponding provisions in 1981 Act (Comth.).

87. Ibid., ss. 78 and 79; re-enacted in 1894 Act, s. 41 and 42. No corresponding provisions in 1981 Act (Comth.).

88. Ibid., s. 80 (5); re-enacted in ibid., s. 43 (5). No corresponding provision in 1981 Act (Comth.).

89. Ibid., s. 80 (6). Protection against the mortgagor's bankruptcy is conferred by s. 80 (4); re-enacted in 1894 Act, s. 43 (4). For position under the 1981 Act (Comth.), see Re North Brisbane Finance and Insurances Pty. Ltd. (1983) 8 A.C.L.R. 274.

The extended facilities provided for creating mortgages in no way detracted from the strict requirements of the Act (Imp.). There had never been a departure from the cardinal doctrine of excluding foreigners from owning British ships or any shares therein.<sup>90</sup> Judicial enforcement of the statutory formalities, which were essential to the validity of every mortgage, greatly served to implement the doctrine. In The Liverpool Borough Bank v. Turner<sup>91</sup> the bank required Lamont to furnish security for an overdraft. Lamont and his associates agreed in writing to assign their ship to the bank as security. No other steps were taken by the bank which continued to make further advances to them. The shipowners having become bankrupt, the ship was sold and the proceeds remained in the hands of the assignees in bankruptcy. Judgment was given against the bank, as plaintiffs, which claimed the proceeds in part discharge of the debt. In dismissing the appeal, Lord Chancellor Campbell referred to the legislative intention and policy as follows:<sup>92</sup>

"It is the duty of the Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. Looking to the great peculiarity of the forms of transfer and mortgage here required, and the purposes which they were to serve, I cannot doubt that the legislature intended that these and no other forms were to be used. A disclosure of the true and actual owners of every British ship is considered to be of utmost importance with a view to the commercial privileges...and still more with a view to the proper use and honour of the British flag."

It is possible to detect an underlying reason for the legislative insistence on total compliance with the procedures laid down. Observance of the formalities by the parties to a mortgage transaction was a pragmatic way of securing information. It was crucial to the proper administration of the system. Thus accurate records of all mortgages, whenever effected, would enable the registry officials to identify the ships and their owners. This factor sufficiently explains the special nature and legal effect of every entry made by a Registrar.

90. Ibid., s. 70; re-enacted in 1894 Act, s. 34. See Shipping Registration Act 1981 (Comth.), s. 40.

91. (1860-1861) 30 L.J. Ch. (N.S.) 379.

92. Ibid., p. 381.

That this objective had been translated into action is seen in a number of cases. In Chasteauneuf v. Capeyron and Another,<sup>93</sup> it was held that a Registrar had no power to erase an entry. Moreover, a mortgage when discharged by an entry could not be revived by a memorandum on the register that the receipt was issued by mistake.<sup>94</sup> The sanction imposed for non-observance was postponement of the rights of a mortgagee. Thus a legal mortgage, executed in statutory form and registered, has priority over an equitable mortgage previously made. It is immaterial that, at the time of the legal mortgage, the mortgagee is aware of the pre-existing mortgage.<sup>95</sup>

The Merchant Shipping Act 1894 (Imp.) virtually re-enacts the mortgage provisions of its predecessor,<sup>96</sup> thus reinforcing the legislative policy on a permanent basis. In many respects, the system of mortgage developed over almost seven decades is second to none. While preventing foreigners from becoming legal owners of British ships or any shares therein, the system has the inherent advantage of utilising foreign capital to finance Britain's maritime programme. It set the pattern for Australian legislation<sup>97</sup> and the legislation of other Commonwealth countries<sup>98</sup> on the subject. In a number of ways, the International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages, 1967,<sup>99</sup> has taken cognizance of the rules of English maritime law.

93. (1882) 7 App. Cas. 127 (P.C.).

94. Bell v. Blyth (1868) 4 Ch. App. 136; The Rose (1873) L.R. 4 A & E 6.

95. Coombes v. Mansfield (1855) 3 Drew 193; Black v. Williams [1895] 1 Ch. 408. S. 69 of the 1854 Act (Imp.) had no application where the mortgages concerned were not registered.

96. The Merchant Shipping Act 1894, s. 57, has restored the elements of fair play and equity. They are essential in all commercial dealings where ships and shares therein are involved. For corresponding provision, see Shipping Registration Act 1981 (Comth.), s. 47.

97. Shipping Registration Act 1981 (Comth.), ss. 38-44, as amended by Shipping Registration Amendment Act 1984 (Comth.), ss. 15-17.

98. E.g. Merchant Shipping Act (Cap. 172), Singapore Statutes, Revised Edn. 1970, ss. 416 and 416A-416F; Merchant Shipping Ordinance, 1952 (Malaysia), as amended, ss. 41-47.

99. Signed in Brussels on 27th May, 1967; see Articles 1 and 6. Australia, however, is not a signatory to this Convention: Register of Texts of Conventions and Other Instruments concerning International Trade Law (1971), vol. 1, p. 268.

## VIII. REGISTRATION OF SHIPS IN AUSTRALIA

### 1. Application of Imperial Laws

By reference to statutes and case authorities in chronological order, we have examined how the underlying principles of the registration system were formulated. Our task here is twofold. First, it is essential to ascertain the stage of development attained by English maritime law at the time when it was substantially imported into Australian colonies. Second, there must be proof as to the probable date or dates when British ship registries were first established in Australian ports and capital cities. Clearly the existence of agreements relating to the sale or mortgage of British ships made in the early days of colonial settlement is insufficient for our purpose.

Replies to queries made show that the first two register books at Port Jackson in New South Wales have been lost. Information derived from correspondence<sup>1</sup> on the subject of ship registration indicates that "Lynx", the thirteenth vessel, was registered at Port Jackson in 1827.<sup>2</sup> It was probable that Port Jackson had the first ship registry established under the 1823 Act (Imp.).<sup>3</sup>

According to the Melbourne records, the first ship to be registered in 1839 was "Gem". It is presumed that the registration was made under the Act (Imp.) of 1833.<sup>4</sup>

In Queensland, official records show that the earliest vessel "Caernarvon" was allocated the number 32678 at the Port of Morton Bay, registered in 1847, and issued with the registration certificate

1. With the Department of Business and Consumer Affairs, Bureau of Customs, Canberra. The reply dated 16th November, 1981, bearing the reference C. 81-095 was given by Mr. A.W. Mitchell for the Assistant Secretary, Inspection and Controls. It provides the source material as to when British ship registries were first set up in the Australian colonies.
2. Enclosed with Mr. A.W. Mitchell's reply were photocopies of letters by Mr. P.C. Mowle and Mr. "Wareing" dealing with the registration of British ships in the early days of Port Jackson and Port Adelaide.
3. 4 Geo. IV, c. 41 titled "An Act for the registering of Vessels". But one cannot be absolutely certain.
4. 3 & 4 Wills., c. 55 titled "An Act for the registering of British Vessels".

in 1858.<sup>5</sup> The registration procedure was laid down in the Act (Imp.) of 1845.<sup>6</sup> It seems, however, that the earliest available register entry made at Brisbane was that of the vessel "Sagitta" in 1898. If that is correct, she must have been registered under the 1894 Act (Imp.).<sup>7</sup>

In South Australia, according to records from the Port of Adelaide, "Victoria" was the first vessel to be registered in 1838. However, information from the Board of Trade in London shows that the Port of Adelaide was proclaimed a "Port of British Registry" in 1855,<sup>8</sup> and the "Verona" was the first vessel registered there in 1855.

In Hobart, the registry of British ships was first established in 1850. Branch offices were later set up at Devonport and Burnie.<sup>9</sup>

It was not until 1856 that the registry of British ships was established at the Port of Fremantle in Western Australia. The data for the years 1976 to 1980 made available by the Bureau of Customs at the Port of Fremantle<sup>10</sup> show an irregular rise in the number of ship registrations.

5. The information concerning the names of ships and the dates of registration was supplied in response to questionnaires addressed to the Department of Business and Consumer Affairs, Bureau of Customs, Canberra.
6. 8 & 9 Vic., c. 89, titled "An Act for the registering of British Vessels" ss. 1-3, 10 and 11. It is quite possible that the certificate was issued pursuant to the Merchant Shipping Act 1854 (Imp.), Part II.
7. 57 & 58 Vic., c. 60, Part I.
8. The letter was dated 24th August, 1967, and signed by a "Wareing" on behalf of the British Board of Trade. The year (i.e. 1855) seems to be correct or close to being correct. In The Empress (1856) Swab. 160, the facts, as reported, show that a ship originally registered in Sunderland, Durham, was, after an unlawful sale, registered at Port Adelaide in 1853, or thereabout.
9. The information was gathered by personal enquiries at the Customs building, Hobart, where the British ship registry was housed.
10. Based on reply given in answer to questionnaire sent out.

### Ships registered at Port of Fremantle

Year	Number of Ships Registered	Gross Tonnage
1980	70	3,723.56
1979	49	13,457.08
1978	50	1,605.39
1977	53	3,392.75
1976	25	2,525.14

The ships registered in the various registries around Australia were all British vessels which were entitled under the 1854 Act (Imp.) to fly the British flag.<sup>11</sup> Later under the 1894 Act (Imp.),<sup>12</sup> the red ensign was usually worn by British merchant ships. The above developments marked the successful implementation of the Imperial policy in the Australian colonies.

#### 2. New Regime

The Shipping Registration Act 1981 (Comth.)<sup>13</sup> enacted by the Commonwealth Parliament came into force on 26th January, 1982.<sup>14</sup> It gives effect to the Australian shipping policy and introduces a somewhat different pattern of owning and operating ships under the new system. By reason of the powers conferred under the 1981 Act (Comth.)<sup>15</sup> and in pursuance of section 4 of the Acts Interpretation Act 1901 (Comth.)<sup>16</sup> the Shipping Registration Regulations 1981 (Comth.)<sup>17</sup> were enacted.

Section 4 of the 1981 Act (Comth.) repealed the Imperial law in Part I of the Merchant Shipping Act 1894 (Imp.) which had extended to Australia as part of her law. As it contains no saving provision, the repealed law would include the subsidiary legislation made under Part I. The 1981 Act (Comth.) totally replaced the British ship registration legislation which had been administered in Australia for almost 150 years.

11. 17 & 18 Vic., c. 104, s. 103 (1).

12. 57 & 58 Vic., c. 60, s. 73 (1) and (2).

13. No. 8 of 1981.

14. Proclamation, Commonwealth of Australia Gazette, No. G. 51, 22nd December, 1982; see also s. 2 of the Act.

15. S. 3 (1) defines "this Act" to include the regulations; see also s. 36 (1).

16. No. 2 of 1901.

17. Notification of such statutory rules appeared in the Commonwealth of Australia Gazette, No. 265, 18th December, 1981.

Expression was given to the predominant philosophy of the Commonwealth Act when the Australian Register of Ships was finally established. This was the long-cherished goal of the Commonwealth Government. The main facets of the policy supporting the move have been outlined in a "Transport Australia" publication<sup>18</sup> as follows:

"Establishment of the Australian Register means that Australian ships will no longer be registered as British - as they have been under the British Merchant Shipping Act...The Government sees the measure as an important development of Australia's status as an independent nation. The rights of a country to determine for the grant of its nationality to ships is fundamental to its national sovereignty. The provisions of Australia's Shipping Registration Act are part of this country's obligations under the Geneva Convention on the High Seas 1958, to which Australia is a signatory."

The statements of policy amplify the political and national sentiments rather than economic considerations. As of 26th January, 1982, all registered merchant ships will be flying the Australian Red Ensign. The other ships registered in Australia have the option of flying either the Australian National Flag or the Australian Red Ensign.<sup>19</sup> As they are Australian ships and no longer fly the British flag, Britain may see the transition as an opportunity to withdraw her protection for Australian ships in international waters. As a sovereign nation, Australia may have much to lose if, in the eyes of the world, she is incapable, by reason of the weakness of her naval force or otherwise, of protecting the ships flying her colours.<sup>20</sup>

One major outcome of the transition is noteworthy. Ships registered under the old regime would depend on Britain's policy, her foreign trade relations and the goodwill of international community towards her. The Commonwealth Government is invested with full control over matters of shipping policy and the regulation of ships registered under the 1981 Act (Comth.). Moreover, the success of the new registration system and the performance of Australian ships as a commercial

18. Australian Register of Ships (1981), Australian Government Publishing Service, Canberra, 1981, p. 1.

19. 1981 Act (Comth.), s. 30. At the time of registration, application must be made for entitlement to fly the National Flag or the Red Ensign.

20. Every country is under an obligation to protect her ships from capture by enemies and piratical attacks.



venture will be evaluated by a number of factors. The acceptance by local and foreign cargo shippers and consignees of the services provided is a crucial criterion. It in turn depends on whether the international conventions relating to the carriage of goods by sea, a satisfactory standard of seaworthiness and other safety requirements have been adopted as part of Australian law.<sup>21</sup> The registration system must also satisfy the insurers as to the absence of "high-risk" or "bad moral" hazards. In other words, insurance policies issued for goods carried on Australian ships must not, as a rule, give rise to additional premiums or be subject to onerous terms.

### 3. Relationship between Ship and the Flag State

Section 15 of the Geneva Convention on the High Seas 1958<sup>22</sup> reads:

"...There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

The phrases "genuine link" and "jurisdiction and control" are not defined in the Convention. From the philosophy of the Shipping Registration Act 1981 (Comth.), it is possible to gather the meaning which the Commonwealth Parliament has given to them. What is clear is this: the administration for over eleven decades of British ship Registration Acts in Australia had failed to convince her legislators that strict adherence to the British policy was in Australia's best interests. In laying down the requirements for the nationality of Australian ships, the Commonwealth Parliament adopted a halfway position between a "flag of convenience" approach<sup>23</sup> and the strict British concept. Thus in marked departure from the British policy, the 1981 Act (Comth.) provides for the registration of ocean-going ships where more than fifty per cent of the shares in them are owned by Australian nationals.<sup>24</sup> It appears that by sections 9 and 14 (b) foreign-owned ships on

21. See supra.

22. Australia became a signatory on 14th May, 1963; see E.D. Brown, The Legal Regime of Hydrospace (1971), p. 212.

23. Examples of countries offering flags of convenience are Singapore, Panama, Liberia, Cyprus, Honduras and Somalia. See B.A. Boczek, Flags of Convenience: An International Legal Study, (1962), p. 2.

24. See s. 8 (1) (c).

demise charter to Australia-based operators may also be registered.<sup>25</sup> The legislation providing for ship registration in such circumstances reflects Australia's policy. Her concept of "genuine link" is not based solely on ownership or on the nationality of the shipowners, but mainly on effective control exercisable through residence. The approach has two distinct advantages. By allowing foreigners who are non-residents to own up to forty-nine per cent of the shares in her ocean-going ships, Australia is maintaining an open-door policy to attract foreign investments. In the unfortunate event of a war or hostility breaking out between Australia and the country of the minority owners, the majority interests will give the Australian Government sufficient control over the use of the ships.

Also, "genuine link" may connote the physical relations between the owners or operators of ships and Australia. Thus ships under twelve metres in length, whether wholly owned or solely operated by Australian residents, are eligible for registration. This point is made clear by section 4 of the Shipping Registration Amendment Act 1984 (Comth.). It has limited the scope of section 9 of the 1981 Act (Comth.). Since the amendment, ships on demise charter can no longer be registered where the charterer being an Australian citizen is not ordinarily resident in Australia.<sup>26</sup> The same prohibition applies where the charterer being a corporate body does not have the principal place of business in Australia.<sup>27</sup>

Jurisdiction and control over Australian ships are exercised through Commonwealth legislation.<sup>28</sup> However, with regard to the application of State criminal laws to acts committed on ships, the consequence of the Shipping Registration Act 1981 (Comth.) is noteworthy.

25. It does not apply where the ship concerned is registered under the law of a foreign country: s. 17.

26. S. 9 (2) (a), as amended by Act (Comth.) (No. 16 of 1984), s. 4.

27. S. 9 (2) (b), as amended.

28. See e.g. the Navigation Act 1912-1973 (Comth.), Shipping Registration Act 1981 (Comth.), Protection of the Sea (Civil Liability) Act 1981 (Comth.), Protection of the Sea (Powers of Intervention) Act 1981 (Comth.), Protection of the Sea (Shipping Levy Collection) Act 1981 (Comth.), etc.

This aspect of jurisdiction dealing with criminal matters is considered by reference to two cases.

In Oteri v. The Queen,<sup>29</sup> two Australian citizens were charged in the District Court of Western Australia with the thefts of crayfish and the tackle. The offences were alleged to have been committed on the vessel "Providence" at the time when she was on the high seas, i.e. about twenty-two miles from the Australian coast. This fact was recognised as sufficient to bring the case within the jurisdiction of the Admiralty of England. One of the defences unsuccessfully raised by the appellants was this. No offence had been committed since neither the criminal law of Western Australia nor that of the United Kingdom was in force at the spot where the offences were committed. The Privy Council dismissed the appeal brought by the appellants. It is noteworthy that the establishment of the Commonwealth of Australia and the passing of the Statute of Westminster Adoption Act 1942 (Comth.)<sup>30</sup> had not prevented English criminal legislation from applying to certain ships on the high seas. The vessel "Providence" was owned by two Australian citizens and licensed under the Western Australian Marine Act 1948-1973. But it was not registered under the Merchant Shipping Act 1894 (Imp.). The Privy Council held that non-registration under section 2 of the Act (Imp.) did not prevent her from being treated as a British ship since her Australian owners were British subjects.<sup>31</sup> Their Lordships held that the Theft Act 1968 (U.K.) applied to persons in British ships on the high seas, which were within the jurisdiction of the Admiralty.<sup>32</sup>

29. [1977] 1 Lloyd's Rep. 105 (P.C.). A similar case where the Theft Act 1968 (U.K.), s. 1, was held to apply is The Queen v. Shea [1978] 1 S.A.S.R. 591. The theft was committed on board a fishing vessel, owned by Australian citizens, some five or six miles off the coast of South Australia.

30. No. 56 of 1942.

31. The British Nationality Act 1948 (Imp.), s. 1, defines the term "British subjects" to include persons who are Australian citizens by naturalization.

32. See also Admiralty Offences (Colonial) Act 1849 (12 & 13 Vic., c. 96) and Admiralty Offences (Colonial) Act 1860 (23 & 24 Vic., c. 122), which continue to remain in force in relation to Australian States.

The above approach was preceded by the Tasmanian case of William Holyman & Sons v. Eyles.<sup>33</sup> Morris, C.J., treated as the applicable law the Protection of Animals Act (U.K.),<sup>34</sup> and not the Cruelty to Animals Prevention Act 1925 (Tas.).<sup>35</sup> The offence of cruelty to animals was committed on board a ship owned by a Tasmanian company while she was crossing the Bass Strait.

So long as English Criminal law continued to apply to offences committed on or from ships registered in Australia, jurisdiction and control remained with the British Parliament. The above decisions were in part due to the limited operation of Australian State laws. In New South Wales v. The Commonwealth,<sup>36</sup> the majority of the High Court Judges held that the low-water mark constituted the seaward boundary of the States for the exercise of sovereignty and legislative power. The State Parliaments were therefore incompetent to pass criminal laws which operated beyond such territorial limits.

The Crimes at Sea Act (Comth.)<sup>37</sup> defines certain ships as "Australian ships". Its object is to extend State laws to acts committed on or from ships operating outside the low-water mark. Subject to certain links being established, the criminal laws in force in a State or Territory will then apply to offences committed on or from such ships.<sup>38</sup> It is submitted that in passing the 1979 Act (Comth.) and the State complementary legislation,<sup>39</sup> the Commonwealth and State Parliaments are

33. [1947] Tas. S.R. 11.

34. (1911) 1 & 2 Geo. V, c. 27.

35. 16 Geo. V No. 30.

36. (1976) 50 A.L.J.R. 218, supra.

37. No. 17 of 1979.

38. Ibid., s. 6 (1).

39. It includes the Crimes (Offences at Sea) Act (N.S.W.) (No. 145 of 1980), Crimes (Offences at Sea) Act (S.A.) (No. 5 of 1980), Crimes (Offences at Sea) Act (Tas.) (No. 69 of 1979), Crimes (Offences at Sea) Act (Vic.) (No. 9229 of 1978), and Crimes (Offences at Sea) Act (W.A.) (No. 96 of 1979). There are also two enactments which extend the operation of State criminal laws to offshore waters: Offshore Waters Jurisdiction Act (Tas.) (No. 34 of 1976) and Offshore (Application of Laws) Act (W.A.) (No. 72 of 1977). See also C. Saunders, "Maritime Crime" (1979-1980) 12 M.U.L.R. 158

actually exercising jurisdiction and control based on one of two grounds. They are the registration of the ship in Australia or an external territory and the ship's link with Australia or an external Territory in terms of her operations.<sup>40</sup>

In reality, prior to 26th January, 1982,<sup>41</sup> there was no such thing as "Australian ship". Ships registered in Australia under the Merchant Shipping Act 1894 (Imp.) were British ships which flew either the Union Jack or the colours prescribed.<sup>42</sup> The relationship between ships registered in Australia and the flag State, in terms of section 15 of the Geneva Convention 1958, was forged when the Shipping Registration Act 1981 (Comth.) was passed. By section 3 (1) (b) of the Navigation Amendment Act 1981 (Comth.),<sup>43</sup> the definition of "British ship" in section 6 of the Navigation Act 1912-73 (Comth.) has been deleted. It marks a vital departure from the "British ship" concept which had been part of the Imperial policy in Australia for over fifteen decades. Among the steps taken in line with Australia's status as an independent sovereign Nation are the ratification and adoption of a large number of international shipping conventions.<sup>44</sup>

#### 4. Centralised Register

In a number of ways, the Australian registration system differs markedly from its British counterpart. Instead of having a ship registry located in each port or capital city of the State, including the Northern Territory, the Commonwealth Government has centralised all registration functions in Canberra.<sup>45</sup> The Shipping Registration Act 1981 (Comth.) provides for the establishment and maintenance of a single Australian Register of Ships. Although in each capital city there

40. See Crimes at Sea Act 1979 (Comth.), s. 3 (1).

41. Date when the Shipping Registration Act 1981 (Comth.) came into force in Australia, supra.

42. S. 73.

43. No. 10 of 1981.

44. See Navigation Act Amendment Act 1979 (Comth.), Schedules I-V.

45. Shipping Registration Office, Suite 17, Level 4, Wales Centre, Akuna Street, Canberra City, A.C.T. 2601.

is a branch office,<sup>46</sup> its purpose is not to register ships or ship mortgages but to channel shipping documents to the Shipping Registration Office at Canberra, and also to provide information to the public.

As a transitional measure, the 1981 Act (Comth.) provided for automatic registration of certain ships. By section 86, every ship entitled to be registered and was, immediately before the date when the Act came into force,<sup>47</sup> registered under the Merchant Shipping Act 1894 (Imp.) at a port in Australia is deemed on and from that date to be registered under the 1981 Act (Comth.). An owner of a ship which, though not required to be registered, was registered under the previous law may not wish his ship to remain on the Australian Register. He may put an end to the registration here and transfer the ship to another registry outside Australia.

- 46. (i) N.S.W. 186 Kent Street,  
Sydney, N.S.W. 2000.
- (ii) Vic. 44 Market Street,  
Melbourne, Vic. 3000.
- (iii) Qld. Ground Floor,  
Commonwealth Centre Building,  
294 Adelaide Street,  
Brisbane, Qld. 4000.
- (iv) S.A. 27 North Parade,  
Port Adelaide, S.A. 5015.
- (v) Tas. 2nd Floor,  
Gladstone House, 2A Gladstone Street,  
Hobart, Tas. 7000.
- (vi) W.A. 2nd Floor,  
State Housing Commission Building,  
42 Queen Street,  
Freemantle, W.A. 6160.
- (vii) N.T. C.M.L. Building,  
59 Smith Street,  
Darwin, N.T. 5794.

47. On 26th January, 1982, as stated in the Commonwealth of Australia Gazette, No. G. 51, 22nd December, 1981; see also the 1981 Act (Comth.), s. 2.

The following statistical table<sup>48</sup> shows the transactions completed at the Shipping Registration Office at Canberra during the space of one calendar year.

1 JULY 1982 to 30 JUNE 1983

	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	Total
New Registrations	39	42	25	34	42	36	35	39	41	40	64	48	485
Transfers of Ownership	18	32	17	27	35	35	27	32	28	51	40	39	381
Closure of Registration	-	-	2	11	6	-	1	9	6	3	3	19	60
Transfers from British to Australian Registration	101	39	24	142	49	66	37	37	79	47	53	46	720

48. Obtained from the Registrar of Ships, Shipping Registration Office, Canberra.

The total number of ships registered in Australia and the breakdown figure for each of the States including the Northern Territory as at June 30, 1983 are as follows:

<u>Location</u>	<u>Type of Ship</u>					<u>State Total</u>
	<u>Demise Chartered</u>	<u>Commercial</u>	<u>Government</u>	<u>Fishing</u>	<u>Pleasure</u>	
New South Wales	2	217	1	325	1187	1732
Victoria	1	106	19	125	316	567
Queensland	2	101	30	564	461	1158
Western Australia	4	97	4	416	278	799
South Australia	0	35	9	207	161	412
Tasmania	0	79	3	180	147	409
Northern Territory	0	9	2	73	96	180
Totals by Type	9	644	68	1890	2646	5257



A ship must be registered with one of a list of twenty-one home ports furnished by the Registrar of Ships.<sup>49</sup> Unfortunately, as none of the home ports have a ship registry the vital link between them and the ships, which characterised the British system, is missing. It is reasonable to presume that the Commonwealth Government's policy in establishing a branch office in each State and the Northern Territory is to serve the interests of people dealing with ships registered with home ports in the State or the Northern Territory. If this reasoning is correct, it is necessary for every branch office to maintain an accurate and up-to-date record of all dealings affecting ships in the State or Territory. Otherwise prospective purchasers will still have to inspect the centralised Register in Canberra. Unnecessary delay, expense and inconvenience will invariably result. At present, it appears that a branch office has only part of the Register of Ships containing particulars relating to ships with home ports in the State or Territory where the branch office is located. However, the information provided in the relevant part of the Register of Ships is several weeks behind time.

One facet of the centralised system of registration may be a pitfall for unwary ship purchasers and financiers. This problem is highlighted by the facts of and decision in General Credits (Finance) Pty. Ltd. v. Registrar of Ships and Another.<sup>50</sup> The Registrar received two applications, one from the plaintiff on 15th July, 1982, and the other from F Pty. Ltd. on 13th July, 1982, for registration as owner of the vessel Whitsunday Wanderer. The Registrar informed the plaintiff's solicitors that their application suffered from a degree of informality. On 11th October, 1982, the plaintiff's solicitors were informed of the Registrar's intention to register the vessel in the name of F as owner. The plaintiff obtained an injunction on 12th October, 1982, restraining the Registrar from registering F's application as shipowner and from registering a mortgage of the ship in favour of L Pty. Ltd. Despite the injunction, the registration was effected and a registration certificate under the 1981 Act (Comth.) was issued on 13th October, 1982. There was evidence that the Registrar was unaware of the court order made on the previous day. The court did not attribute to him any blame

49. This list is found on page 4 of the undated Instructions issued to each of the branch offices.

50. (1982) 44 A.L.R. 571.

for his ignorance of the order. Rather it appeared to have condoned the bureaucratic practice at the central telex office, some three kilometres from the Registrar's office, as the cause of the delay in forwarding to him the telex messages received. What is remarkable is that some responsibility was "thought to rest" on the plaintiff's solicitors for delay in advising the Registrar by phone regarding the issue of the court order.

Moreover, for all prospective purchasers and competing claimants the decision has crucial implications. First, the limitations of the restraining order are noteworthy. Such an "order operates in personam and then only upon service."<sup>51</sup> Obviously, where the order is obtained in a State Supreme Court outside Canberra, its service on the Registrar will necessarily take time. The facts of the case suggest that service of the order on a branch office located in a capital city is insufficient. The nature of the order is such that it does not of "its own force...expunge the relevant entry from the Register of Ships."<sup>52</sup> Second, the court considered sections 59 and 60 of the Shipping Registration Act 1981 (Comth.). Section 59 empowers the court to order the rectification of the Register. Under section 60 the Registrar may alter the Register, e.g. in circumstances where a clerical or obvious mistake occurs, by expunging the registration which has already been made. McPherson, J., was of the view that the matter did not come within the scope of section 60. His refusal to order the rectification of the register is plainly based on the principle of "integrity of the register",<sup>53</sup> propounded by the learned editors of MacLachlan on Merchant Shipping.<sup>54</sup> It is arguable that each capital city or major port should have a ship registry set up to carry out the full range of functions, as was the case under the Merchant Shipping Act 1894 (Imp.). Such a move will remove many of the difficulties currently encountered.

51. Ibid., p. 573.

52. Ibid., p. 573.

53. Ibid., p. 574.

54. G St. Clair Pilcher and O.L. Bateson (7th ed. 1932), p. 62.

Despite the differences considered, there are many matters of principle and practice which are common to the Australian and British systems. In General Credits (Finance) Pty. Ltd. v. Registrar of Ships and Another,<sup>55</sup> McPherson, J., aptly highlighted several basic similarities. He held that a registered title to or mortgage of a ship has priority which displaces the rules of common law or equity. His decision is based on his conception that the Shipping Registration Act 1981 (Comth.) is, in many respects, modelled on the Merchant Shipping Act 1894. He ably explained the reasons in the following terms:<sup>56</sup>

"It is not, in my opinion, possible to compare the provisions of the two enactments without concluding that the draftsman of the recent Act deliberately adopted the form of many of the provisions of the earlier statute with the intention that they should be construed in the light of existing decisions on similar provisions of the Imperial Act. The conclusion that follows is that, in establishing an Australian Register of Ships and a process of registration therein, the legislative intention was to impute to them a purpose, function, and effect similar to those of the Imperial legislation."

The Australian registration system also shares in common several other features with its British counterpart. A ship or share in a ship, which is registrable or registered under the Shipping Registration Act 1981 (Comth.) or the Merchant Shipping Act 1894 (Imp.), can only be transferred by a statutory bill of sale.<sup>57</sup> Both the Australian State and British Parliaments have adopted in their non-shipping legislation a similar definition of the term "bill of sale". In each case, it expressly excludes from its scope "transfers or assignments of any ship or vessel, or any share thereof."<sup>58</sup> Undoubtedly, the exception does not

55. (1982) 44 A.L.R. 571. He followed the principles laid down in English and Canadian decisions: pp. 574-5.

56. *Ibid.*, p. 575.

57. See the 1981 Act (Comth.), s. 36 (1) and the 1894 Act (Imp.) s. 24.

58. Bills of Sale Act 1878 (41 & 42 Vic., c. 31), s. 4. For corresponding provisions in Australian State enactments, see Bills of Sale Act (N.S.W.) (No. 10 of 1898), s. 3; Bills of Sale and Other Instruments Act 1955 (Qld.) (4 Eliz. II No. 16), s. 6 (1) (viii) (c); Bills of Sale Act 1886-1972 (S.A.), s. 2; Bills of Sale Act 1900 (Tas.) (64 Vic. No. 70), s. 4 (1); Instruments Act (Vic.) (No. 6279 of 1958), s. 32; Bills of Sale Act (W.A.) (No. 45 of 1899), s. 5. The exclusion embraces an unfinished ship together with the building materials ready to be used, and also the articles required for navigating a ship; Re Softley, Ex. parte Hodgkin (1875) L.R. 20 Eq. 746 and Coltman v. Chamberlain (1890) 25 Q.B.D. 328.

cover boats or small pleasure craft. The current significance attached to the registration certificate and to the Australian Register of Ships as a public record has its origin in English maritime law. Another important aspect underlying both systems is the application of a similar statutory principle to determine the priority of competing mortgage claims.<sup>59</sup>

#### 5. Mortgage of Ship or any Share therein

An important part of the Registrar's work is the registration of ship mortgages and also entry of discharge of the same. The figures below show the extent to which ships and shares therein are used as security under the Shipping Registration 1981 Act (Comth.). In so far as the Register and all the entries made therein are open to public inspection, the policy of the old law is actually being followed -

Number of Entries: 1st July 1982 to 30th June 1983. <sup>60</sup>

Transactions	Jul.	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	Total
Mortgages	25	32	9	24	19	46	18	23	31	24	35	23	309
Discharge of Mortgages	9	14	7	18	10	15	31	13	14	20	23	18	192

59. Discussed in the pages immediately following.

60. Statistics obtained from the Registrar of Ships, Shipping Registration Office, Canberra.

The 1981 Act (Comth.) confers on the registered mortgagee of the ship or shares therein a number of important statutory rights. The provisions are modelled on those of the Imperial Act 1894.

Section 39 provides the rule for fixing the order of priority where two or more mortgages have been effected in respect of the same ship or shares therein. Under such circumstances -

"the priority among the mortgages is in accordance with the order of registration of the mortgages, irrespective of the dates upon which they were made or executed and notwithstanding any express, implied or constructive notice."

The "priority" rule based on the mortgage being actually registered first at the registry located in Canberra may often prove to be a trap for the unwary ship financiers or creditors. In the usual event of a mortgage being executed outside Canberra, e.g. in any of the State capitals, the lapse of even a few days prior to the registration will make it a risk for a person to accept a ship or shares therein as security. It is possible for a dishonest shipowner or holder of shares in a ship to create, in a couple of hours, several mortgages in favour of different persons. Personal or telex enquiries, though made early by prospective creditors at the registry at Canberra, may disclose no entry of any mortgage. It is crucial for each mortgagee to lodge the mortgage instruments personally at the registry ahead of those of a subsequent mortgage. The delay involved in sending the instruments for registration through one of the branch offices will result in the loss of priority. It will be recalled that under the Merchant Shipping Acts (Imp.)<sup>61</sup> registries were conveniently located in most ports and State capitals. Problems of the type envisaged above seldom arose.

One gap in the Shipping Registration Act 1981 (Comth.) is that it does not contain a provision similar to section 30 of the Merchant Shipping Act 1894 (Imp.). The section gives the court a discretionary power, inter alia, to make an order which prohibits, for a limited time, any dealing with the ship or any share therein. This gap in the law

61. 1854 (Imp.), Part II, and 1894 (Imp.), Part I.

does not prevent a person, who is interested in a ship, including a mortgagee, from relying on section 75 (iii) of the Commonwealth Constitution read in conjunction with the Judiciary Act 1903-1973 (Comth.). However, this procedure, which leads to the issue of the order of injunction, is often ineffective because of the delay involved.<sup>62</sup>

The risk of a mortgage being postponed as a result of the fraud of the mortgagor or delay in effecting registration has been removed by section 18 of the Shipping Registration Amendment Act 1984 (Comth.). By the amended section 47A (1) of the 1981 Act (Comth.), a person claiming an interest in a ship or the shares therein under an unregistered instrument may lodge with the Registrar a caveat in the prescribed form. The effect is to forbid the entry in the Register of any instrument relating to any dealing affecting the interest until the caveator is notified of the intended dealing.

A mortgage of a ship or whatever shares in a ship, which is registered under the 1981 Act (Comth.), is protected in a number of ways.

It is relevant to consider first the anomalies that existed until recently. Under the old companies legislation in Australia, a charge created over a ship or any share therein belonging to a company had to be registered. For example, under the repealed Companies Act 1962 (Tas.), the charge had to be registered as required by section 100 (1).<sup>63</sup> Otherwise it would be void as against the liquidator and any creditor of the company. In addition, the same charge was required under the Merchant Shipping Act 1894 (Imp.) to be registered at the ship's registry<sup>64</sup> which could be located at a different State. There was uncertainty as to how inconsistency relating to the priority accorded to the charge

62. See General Credits (Finance) Pty. Ltd. v. Registrar of Ships and Another (1982) 44 A.L.R. 571, *supra*.

63. No. 66 of 1962. For similar provision, see s. 100 (1) in the following State legislation (repealed): Companies Act (N.S.W.) (No. 71 of 1961); Companies Act (Qld.) (No. 55 of 1961); Companies Act (S.A.) (No. 56 of 1962); Companies Act (Vic.) (No. 6839 of 1961); and Companies Act (W.A.) (No. 82 of 1961).

64. See ss. 33 and 36. In the United Kingdom, dual registration continues to be the requirement. Under the Companies Act 1948 (11 & 12 Geo. 6, c. 38), s. 95, a charge, including a mortgage, on a company-owned ship or any share therein must be registered. Registration is also necessary where the company acquires a ship or any share therein subject to a pre-existing charge: M. Thomas and D. Steel, The Merchant Shipping Acts (7th ed. 1976), para. 63.

or mortgage under the two Acts was to be resolved. Moreover, difficulty would also arise where a mortgage, though registered under the Imperial Act, was not registered as a charge under the Companies Act 1962 (Tas.). The courts would in all probability apply section 2 of the Colonial Laws Validity Act 1865 (Imp.). Thus an Imperial law which applies to an Australian State by paramount force will render a State law null and void to the extent of its repugnancy.

The situation has been remedied by the current uniform companies legislation<sup>65</sup> and a decision of the Supreme Court of Queensland. Section 200 (1)<sup>66</sup> sets out the various types of assets over which registrable charges may be created by a company. To simplify matters, it expressly excludes "a ship registered in an official register kept under a law in force" in a State or Territory relating to title to ships. In Re North Brisbane Finance and Insurances Pty. Ltd.,<sup>67</sup> on 12th February, 1982, a company as owner of the ship, Sandshoe, granted a mortgage of the same. The mortgage in the form required by section 38 of the Shipping Registration Act 1981 (Comth.) was duly registered on 23rd March, 1982. It was, however, not registered as a charge pursuant to section 100 of the Companies Act 1961-1980 (Qld.). Under section 100 (1), the consequence of non-registration was that the charge was invalidated "in so far as it confers a security interest, not only against the liquidator ...but also against a secured creditor of the company prior to the winding up...." <sup>68</sup> The 1961-1980 Act (Qld.) was repealed when the Companies (Application of Laws) Act 1981 (Qld.)<sup>69</sup> and the Companies (Queensland)

65. In December 1978, the Commonwealth and the States entered into an agreement to provide for a co-operative scheme for laws relating to companies and their administration. Pursuant to the agreement set out in the Schedule to the National Companies and Securities Act (Comth.) (No. 173 of 1979), similar companies legislation was enacted by each of the State Parliaments.

66. See e.g. Companies (Tasmania) Code, 1982.

67. (1983) 8 A.C.L.R. 274.

68. Ibid., p. 275.

69. No. 110 of 1981.

Code 1981 came into force on 1st July, 1982. However, by section 30 (9) of the Companies (Application of Laws) Act 1981 (Qld.), certain provisions of the 1961-1980 Act (Qld.), including section 100, continued to remain in force. McPherson, J., correctly held that the Shipping Registration Act 1981 (Comth.) fulfils the description of "a law in force in the State relating to title to ships." He accepted the argument for the mortgagee that section 100 of the 1961-1980 Act (Qld.), either alone or in conjunction with section 30 (9) of the 1981 Act (Qld.), was inconsistent with the Shipping Registration Act 1981 (Comth.). By section 109 of the Commonwealth Constitution, where a State Act is inconsistent with a Commonwealth Act, the former shall, to the extent of its repugnancy, be rendered null and of no effect. Accordingly, non-registration under section 100 of the 1961-1980 Act (Qld.) read in conjunction with section 39 (9) of the 1981 Act (Qld.) did not affect the validity of the mortgage as against the company liquidator.

McPherson, J., gave a broad interpretation to several provisions of the Shipping Registration Act 1981 (Comth.). It is much in line with the object of both Australian and British legislation to protect the interests of creditors. The purpose, no doubt, is to continue the ancient policy of encouraging the wealthy and financial institutions to accept mortgages of ships or shares therein as sufficient security for their loans and investments. He construed the rights of mortgagees in the following words:<sup>70</sup>

"Section 40 of the Act in substance confers on the mortgagee of a ship the status of the holder of a statutory charge by way of security...It is in that context that s. 41 confers on the ship's mortgagee a power absolutely to dispose of the ship and to give effectual receipts in respect of the disposal."

In the light of the facts of the case, the construction given is of special importance to mortgagees. The reason is that the Shipping Registration Act 1981 (Comth.), unlike the Merchant Shipping Act 1894 (Imp.),<sup>71</sup> contains no provision protecting mortgagees against the consequences of the bankruptcy or liquidation of ship mortgagors.

Section 15 of the Shipping Registration Amendment Act 1984

70. (1983) 8 A.C.L.R. 274, p. 277.

71. See s. 36.



(Comth.) has increased the protection for subsequent ship mortgagees. By section 41 (2),<sup>72</sup> as amended, a mortgagee of a ship or any share therein shall not dispose of it unless he has first notified the Registrar of his intention to do so. The Registrar is duty-bound to transmit forthwith the information to each subsequent mortgagee.<sup>73</sup> In principle and practice, the object is sound. A subsequent mortgagee may have the opportunity to purchase the ship or any share therein, and take over the rights of the first mortgagee. Moreover, exercise by the first mortgagee of the absolute power to dispose of the ship may result in the ship being transferred out of the Australian Register and put out of the reach of the subsequent mortgagees. On receipt from the Registrar of the information, a subsequent mortgagee may decide on the appropriate course of action,<sup>74</sup> including taking out a warrant of arrest for the ship. The new provisions, which have no counterpart in the Merchant Shipping Act 1894 (Imp.), serve to enhance the value of subsequent mortgages.

#### IX. CONCLUSION

In one essential respect, the Commonwealth policy differs from its Imperial counterpart. The Shipping Registration Act 1981 (Comth.) has implemented the concept of effective control based on the ship-owners' residence in Australia as the genuine link between Australian ships and the Commonwealth. In terms of international trade relations the Commonwealth approach provides certain advantages. By allowing foreigners to become minority shareholders of Australian ships, the law seeks to draw foreign investments into the country. The limited foreign ownership will, in the main, ensure the availability of sufficient cargo for shipment by Australian ships on voyages around the world.

Apart from the above difference, the Shipping Registration Act 1981 (Comth.) was, in substance, drafted according to the philosophy of the Imperial Act. For example, the owner of an Australian ship

72. Shipping Registration Act 1981 (Comth.).

73. Ibid., s. 41 (3), as amended.

74. It appears that, by lodging a caveat under s. 47A (1), as amended, a subsequent mortgagee is unable to prevent the first mortgagee from disposing of the ship to enable her to be registered in a foreign registry.

under the 1981 Act (Comth.),<sup>75</sup> like the owner of a British ship under the Imperial Act,<sup>76</sup> enjoys total immunity in certain cases of loss of, or damage to, goods. Another aspect of the policy concerns revenue-raising as a long-term object. A new schedule of fees for registration of ships, mortgages, transfers and other services relating to the Register has been introduced.<sup>77</sup> The fees received will cover about ninety-four per cent of the costs presently incurred by the Commonwealth Government in the maintenance and operation of the ship registry.<sup>78</sup> It is expected that, when the numbers of Australian ships increase in the foreseeable future, the revenue from the fees and stamp duties will be substantial.

It is difficult to avoid the conclusion that Commonwealth legislators have, in large measure, adopted the main ingredients of the Imperial ship registration policy.

75. See Navigation Act 1912-73 (Comth.), s. 338, as amended by the Navigation Amendment Act 1979 (Comth.), s. 65 (1).

76. S. 502.

77. See the Shipping Registration Regulations (Amendments) (Comth.) (No. 273 of 1984), which also repealed the Third Schedule to the Shipping Registration Regulations (Comth.) (No. 363 of 1981).

78. See Marine Notice (No. 13 of 1985) dated 13th September, 1985, from the Department of Transport, Canberra.

## CHAPTER FIVE

### PROBLEMS OF MARINE POLLUTION BY OIL

#### I. INTRODUCTION

One of the serious hazards of marine transportation is oil spills. The notorious "Torrey Canyon" disaster off the coast of Cornwall in England in March, 1967, is in many ways the worst case of oil pollution in modern times. Over 80,000 tonnes of crude oil were released.<sup>1</sup> Apart from that incident, the Royal Commission on Environmental Pollution has reported another twenty-two cases of pollution in which central governments were involved.<sup>2</sup> In The "Amoco Cadiz", which grounded off the French coast in March, 1978, the damages claimed came to £2,360, 478-14. Probably the Elevi V/Roseline has given rise to the largest single claim for pollution damage, viz. £3,626, 353.97.<sup>3</sup>

In Victoria alone from February, 1975, to January, 1978, about fifty oil spills were reported, of which over half the number occurred during bunkering operations.<sup>4</sup> Between March, 1970, and March, 1978, of the thirteen oil spills in Australian waters, outside Victoria, one was a fairly major disaster. It included the spillage of over 15,000 tonnes from a Greek tanker "Princess Anne Marie", 300 miles off the coast of Western Australia.<sup>5</sup>

In May 1978, the Supreme Court of New South Wales imposed a \$10,000 fine on the master of the vessel Stolt Sheaf, the highest fine recorded for the State. Slattery, J., was reported as saying:

"I am nevertheless satisfied that extensive pollution cannot be regarded lightly."

The court decided that the discharge was "sufficiently serious to merit a very solid deterrent fine."<sup>6</sup> That even prior to 1974 oil pollution had been viewed as fast reaching dangerous proportions is

1. The "Torrey Canyon", April 1967 (Cmnd. 3242), paras. 3 and 4, H.M.S.O., London.
2. Eighth Report, October 1981 (Cmnd. 8358), pp. 72-73, H.M.S.O., London.
3. Ibid., p. 73.
4. Hansard, Victorian Legislative Assembly, 12th April, 1978, pp. 1425-1429, Victoria.
5. Report on Prevention and Control of Oil Pollution in Marine Environment, Parliamentary Paper No. 270/1977 (Comth.), 5th Report, AGPS, Canberra, Appendix IX.
6. Ibid., para. 100.

reflected in the legislation of three States. The penalty imposed for discharge of oil in breach of statutory provisions has been sharply raised from \$2,000 to \$50,000.<sup>7</sup> Apart from curbing negligent and, in some instances, intentional spills, heavy penalties are necessitated in part by long-term considerations of protection to marine life and the physical environment.

No research on the subject is complete without a sufficient understanding of the nature and type of damage brought to light after very extensive public enquiries. According to a Commonwealth parliamentary paper,<sup>8</sup>

"Major oil spills have a clear and obvious deleterious effect on the marine environment and on the communities of plants and animals living there...the results may affect the survival of an important species or alter the balance in the food chain...The most obvious environmental effect of oil is usually the coating of large numbers of seabirds, nearly all of which die...The second harmful effect of oil is related to its inherent toxicity...The harmful danger to fish lies in the damaging effect oil spills may have on near-shore nursery grounds...Oil spills in Botany Bay may have caused contamination of oysters with economic loss to growers...The presence of oil or tar globules on a beach can have a serious impact on local communities through the loss of, or temporary damage to, recreation resources. This can lead to severe financial losses particularly in holiday areas...."

To the above-mentioned hazards are added new elements, e.g. the immense costs of clean-up operations, the effects of the chemicals used and the imminent risks of uncontrollable fire risks. In Australia, there have been several notorious occurrences of oil spills into seawater, resulting in fire destruction of ships and property.<sup>9</sup> The deteriorating situations are compounded by the use in Australian waters

7. E.g. the Prevention of Oil Pollution of Navigable Waters (Amendment) Act (N.S.W.), No. 59 of 1973, s. 7 C (1), Prevention of Pollution of Waters by Oil Act Amendment Act (S.A.), No. 87 of 1972, s. 3; see also Dalgety Australia Ltd. v. Griffith [1980] 24 S.A.S.R. 249, p. 252, per Mitchell J.; Prevention of Pollution of Waters by Oil Act Amendment Act (W.A.), No. 82 of 1973, s. 4. Under Commonwealth legislation and international conventions, a \$50,000 penalty is becoming common, *infra*.

8. Parliamentary Paper No. 270/1977 (Comth.), 5th Report, *op. cit.*, pp. 7-10.

9. E.g. Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners and the Commonwealth of Australia (1950) 83 C.L.R. 353. Oil on surface of water at Fremantle was ignited. Another case with more disastrous consequences occurring at Sydney Harbour was Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. [1961] A.C. 388 (P.C.).

of larger tankers to carry oil between oil wells, refineries, terminal installations and storage depots.

The frequent occurrences of oil spills merit an examination of the protection of persons whose interests or property is damaged. It is our aim to consider, among other things, the effects which oil-pollution damage and the recent legislation<sup>10</sup> on the subject have on the development of maritime law. The extent to which interests and rights under maritime law may be adversely affected by such legislation will be evaluated. In the analysis, we shall consider the means available for recovering damages for loss or damage caused as a result of unlawful interference or wrongful acts. Throughout, emphasis is placed on the ways in which maritime law principles may be applied to supplement the new remedies introduced by legislation, and redress the pollution damage suffered.

For our purpose, it is necessary to examine a number of areas. The remedies available at common law and its limitations form a convenient starting point. As regards State legislation, the penalties imposed for breach and the strict civil liability imposed are considered with the view to bringing them into line with maritime law. In the long term, it may be expedient for the wide-ranging measures and the "strict-liability" remedies introduced by Commonwealth legislation to be treated as an extension of maritime law.

## II. COMMON LAW REMEDIES

### 1. Nuisance

It is vital to ascertain how far an action based on public nuisance may provide satisfactory remedy. The object is to consider whether better alternatives can be found in maritime law. We are fortunate to have had a number of leading authorities<sup>11</sup> where the principles of common law are applied to oil spills from ships. The judgments show an initial reluctance on the part of judges to extend the principles to pollution damage. This seemingly indifferent attitude may be explained on the ground that Australian and British judges view the worsening

10. Including State and Commonwealth.

11. High Court of Australia and Privy Council decisions, infra.

pollution disasters as the concern of legislatures and the world community.

The first case dealing with the hazards of oil spills to come before the High Court of Australia is Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners and the Commonwealth of Australia.<sup>12</sup> In January, 1945, the S.S. Panamanian, while berthed at Fremantle Harbour, in accordance with the directions of the harbour master, was extensively damaged by fire. By the National Security (General) Regulations 1945 made by the Commonwealth, the neighbouring berths were committed to the commanders of the allied forces. These berths were occupied by submarines and mother ships of allied navies. Quantities of oil or inflammable liquid accumulated on the waters of the harbour close to where the S.S. Panamanian was berthed. The oil or inflammable liquid was discharged or escaped from the submarines and other vessels of war in those parts of the harbour occupied by the Commonwealth. While the S.S. Panamanian was loading flour, a piece of hessian was seen to be smouldering on the ship's deck. An employee of the loading stevedore stamped on the smouldering hessian and then threw it into the water. It was caught on the wharf timber above the water. Within a couple of minutes, a huge flame shot up, badly damaging the ship and destroying 1,000 feet of wharf. Dwyer, C.J., trial judge of the Supreme Court of Western Australia, dismissed the action in nuisance brought by the owners of the S.S. Panamanian against the Harbour Trust and the Commonwealth.<sup>13</sup> The owners appealed against the decision. It was alleged that the harbour in the vicinity of the ship was in a dangerous condition and that the accumulation of oil constituted a continuing nuisance. The defences accepted by all three High Court of Australia judges, who dismissed the appeal, were these. First, the Harbour Trust did not cause and had no power to, and could not by any reasonable precautions, prevent or avoid the accumulations. Second, it neither caused nor permitted the oil to come on the surface of the harbour or to accumulate. Third, the ship's master knew of the oil accumulations and voluntarily took the risk of damage to the vessel arising from the

12. (1950-1951) 83 C.L.R. 353.

13. (1949) 51 W.A.L.R. 94.

ignition of oil. Fourth, the immediate cause of the fire was the new and intervening act of a third party who threw the burning hessian over the ship's side.<sup>14</sup> The necessity of allowing the ships and submarines of allied navies to use part of the harbour resulting in the accumulation of oil and the war preparations strengthened the defences put forward. Lathan, C.J., held that the Harbour Trust was not in the position of an insurer, indicating that no strict liability was imposed.<sup>15</sup> He accepted the evidence that it had done everything possible to reduce the danger arising from floating oil. What was successfully pleaded in essence was the absence of fault on the part of the defendants. It is submitted that this ground on which the High Court dismissed the appeal has seriously restricted the scope of public nuisance as a remedy for pollution damage.

Another aspect of the appeal by the shipowners concerned the liability of the Commonwealth. It was held that, despite the National Security (General) Regulations, the Commonwealth had not assumed "actual possession and control" of that part of the harbour used by war ships of allied navies. The appeal was unanimously dismissed by the three Judges on that ground. The Court is seen as drawing a fine distinction between actual possession or control and the right thereto. It is submitted that the decisive factor was that the Commonwealth had the right to immediate possession and control. In effect this right was exercised by the Commonwealth as the occupier when it allowed that part of the harbour to be regularly used by ships and submarines from which the oil and inflammable liquid escaped. The Commonwealth should therefore have been held liable for particular or special damage suffered by the appellant shipowners based on public nuisance. Moreover, by requiring "actual possession and control" as an essential element, the Court had further reduced the importance of this action. Probably the only course of action open to the shipowners was to sue the allied governments which operated those ships and submarines. But it is not free from difficulties.

14. (1950) 83 C.L.R. 353, p. 368.

15. See Professor G.W. Keeton, "The Lessons of the Torrey Canyon" (1968) C.L.P., pp. 97 et. seq.

Another obstacle that stands in the way of public nuisance as a remedy for pollution damage has been brought to light in Esso Petroleum Co. Ltd. v. Southport Corporation.<sup>16</sup> The House of Lords laid down certain limits to actions to recover damages for public nuisance. In December, 1950, the Inverpool, a small tanker with a cargo of 850 tons of oil was on a voyage to Preston. She shipped very heavy seas and her steering mechanism became erratic. In the estuary of the River Ribble, she ran aground and was in "imminent danger of breaking her back." The safety of the ship and lives of crew on board was at stake. In those circumstances, the master decided to discharge considerable quantities of the cargo of oil to lighten the ship. The oil discharged was carried by wind and the tide to the premises of the respondents, viz. the Southport Corporation. They incurred heavy expenses in cleaning up their premises, which comprised the foreshore and the marine lake in Southport. They sued the appellants, owners of the Inverpool, and her master, to recover the expenses. The proceedings against the appellant shipowners, based on their vicarious liability for the acts of the master as servant, included an action for the special damage suffered.

Devlin, J., the trial judge, for the first time had to review the principles applicable to the claims based on the facts alleged by the respondents. Although in the vast majority of cases nuisance generally emanates from the neighbouring property of a defendant, he recognizes that this fact is not a prerequisite to a cause of action.<sup>17</sup> His vital contribution lies in broadening the range of premises from which nuisance may arise. Another extension made to it is the result of his emphasis that it is not necessary that the nuisance should emanate from a location directly adjacent to the plaintiff's property.

16. [1956] A.C. 218.

17. Lord Radcliffe did not consider decisions in Jones v. Llanrust U.D.C. [1911] 1 Ch. 393 and Smith v. Great Western Ry. Co. (1925) 135 L.T. 112 as having any bearing on the circumstances of the case involving jettison of oil at sea and uncertain action of winds and waves: [1956] A.C. 218, p. 242. It appears that to establish a cause of action in nuisance it is insufficient merely to show oil emanating from a ship or chattel: ibid. p. 225.



The test is one of physical proximity. He said:<sup>18</sup>

"...I can see no reason why, if land or water belonging to the public, or waste land is misused by the defendant, or if the defendant as a licensee or trespasser misuses someone's land, he should not be liable for the creation of a nuisance in the same way as an adjoining occupier would be ...The channel which leads through the Ribble estuary to the port of Preston is admittedly a public navigable river, and the nuisance in this case emanated from there. I do not think it matters that the navigable river does not adjoin the property of the plaintiffs. An action for a public nuisance of this type cannot in principle depend upon contiguity to the highway; it must depend upon whether the plaintiff's property is sufficiently proximate to the highway to be affected by the misuse of it."

Moreover, the analogy from traffic on land was applied to the navigable waterway or estuary where the oil discharge occurred. By law, it is established that persons whose property adjoins the highway cannot complain of damage done by users of the highway unless it is done negligently.<sup>19</sup>

Devlin J.'s doubts were justified. The law does not permit a person, on grounds of necessity, to discharge a cargo of oil onto another person's property for the purpose of saving the ship. However, the House of Lords upheld Devlin J.'s decision that the discharge of oil in the interest of the crew's safety afforded a sufficient answer to the claim based on public nuisance. The necessity to save human lives, which belong to a different scale of values, is certainly an overriding consideration.<sup>20</sup> In many cases of wrecks or shipping disasters involving oil tankers, there is no doubt that similar action to discharge the oil will be taken. As a strong persuasive authority, the House of Lords decision will most likely be followed in Australia.

18. [1956] A.C. 218, p. 225. The reasoning of Devlin, J., was approved by their Lordships.

19. Goodwyn (Goodwin) v. Cheveley (1859) 28 L.J. Ex. 298; Tillet v. Ward (1882) 10 Q.B.D. 17, and Gayler & Pope Ltd. v. Davies & Son Ltd. [1924] 2 K.B. 75 referred to as authorities on the point. Lord Radcliffe, however, shared the view of Denning, L.J., (Court of Appeal) that the shipowners were not responsible for a private nuisance in any ordinary sense: ibid., p. 242.

20. [1956] A.C. 218, pp. 227 and 228.

Unless stringent criteria are applied, it will give the defence an unduly wide scope. The unjust consequence is the sacrifice of the rights of innocent property owners and third parties adversely affected by the discharge.

It seems to be part of a predetermined drama when each succeeding decision only serves to reduce further the efficacy of this "special damage" remedy. Its elements were again examined, this time by the Privy Council, in relation to an extensive fire damage due to an oil spill in a Sydney wharf. In Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. and Another,<sup>21</sup> the respondents (Rs) had two ships undergoing repairs at a Sydney wharf (No. 1). The wharf owners used oxy-acetylene torches to carry out the repairs, causing pieces of red-hot metal to fly into the sea. At a nearby wharf (No. 2), The Wagon Mound, chartered to the appellant (A Ltd.) by demise, was taking in bunkering oil. The engineers of The Wagon Mound carelessly allowed a large quantity of that oil to overflow from the ship into the water. It drifted to and accumulated round wharf No. 1 and Rs' two vessels. In the early hours of 1st November, 1951, the oil on water caught fire and spread rapidly. Extensive damage was caused to wharf No. 1 and Rs' two vessels. Rs sought to hold A Ltd. liable for damages, suing alternatively in nuisance and negligence. The fire was believed to have been started when a hot metal piece fell on some inflammable material which in turn ignited the oil on water.

Walsh, J., in the Supreme Court of New South Wales<sup>22</sup> had held that A Ltd., by polluting the harbour waters with oil, had committed a "wrongful" act constituting a public nuisance. Judgment was given for Rs on the ground that as a result of the nuisance they had suffered damage over and above that suffered by the public. Moreover, he held that liability in nuisance did not depend on foreseeability. A Ltd. appealed to the Privy Council against Walsh J.'s decision based on nuisance.

In delivering the judgment, Lord Reid affirmed Walsh J.'s decision

21. [1967] A.C. 617 (P.C.).

22. [1963] 1 Lloyd's Rep. 402.

to the extent that A Ltd. had committed a public nuisance. Although negligence is not held to be one of the necessary elements in determining liability for nuisance, "it is admitted that fault is essential—in this case the negligent discharge of the oil."<sup>23</sup> In their Lordships' judgment, the foreseeability test must be satisfied in cases of pollution. Thus it is not sufficient that the damage caused to Rs' vessels was the direct result of the nuisance if that damage is "in the relevant sense unforeseeable".<sup>24</sup> In this case, it was found as a fact that the damage or injury, which could be reasonably foreseen, was physical pollution, not injury by fire. The Privy Council reversed the decision of the Supreme Court of New South Wales.<sup>25</sup>

Undoubtedly, the restrictive foreseeability test applied by the Privy Council is a serious setback to the potential of the "special damage" action. It dashed the hopes raised by Walsh, J. in his judgment. A large oil spill can have wide-ranging consequences. These include reduction of earnings of the tourist industry, damage to sea-birds, loss of amenity, e.g. the aesthetic and psychological aspects, adverse effects on the livelihood of fishermen and the costs of clean-up. Often the costs of dealing with an oil pollution incident are not proportionate to the value of the oil spilled! The important question is this. Will all these forms of damage or loss come within the foreseeability rule, even though fire damage is not?

The "special damage" action has one distinct advantage over an action for the tort of negligence. Where a plaintiff proves that he has suffered damage or loss different in nature from that suffered by the general public, he is able to succeed. Subject to proof of the foreseeable consequence, there is the right to recover purely pecuniary loss which is actually suffered.<sup>26</sup>

23. [1967] A.C. 617, p. 639.

24. Ibid., p. 640.

25. For the judgment, see [1963] 1 Lloyd's Rep. 402.

26. P.F.P. Higgins, Elements of Torts in Australia (1970), pp. 360-361. The position is the same under English law: Winfield and Jolowicz on Tort (11th ed. 1979), pp. 354-355.

There are, however, a number of difficulties facing claimants. Since the action seeking compensation is of a personal nature, it has to be brought against the polluter himself and/or the employer who is vicariously liable. Often such persons are not resident in the country where the damage occurs and tend to evade the service of court process. Few shipping agents will continue to act for their foreign principals or co-operate with the claimants. This fact makes it difficult for the actions to succeed. Another complexity, may be added to the situation. The polluter, who may be a ship's engineer, and the employer, which is a limited company operating as a charterer, will generally not have the resources to meet large claims. It is likely that these defendants do not carry insurance policies to cover such contingencies. In due course, we will consider what possible answers to these problems may be found in maritime law.

## 2. Negligence

The efficacy of the tort of negligence is now considered. In Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners and the Commonwealth of Australia<sup>27</sup> the Harbour Trust, as a public body, and the Commonwealth were sued in negligence. It was proved that the wooden structures of the wharves, including the timber of the wharf where the S.S. Panamanian was berthed, were impregnated with oil. Also from time to time there were large quantities of oil on the water. The Harbour Trust as the authority in control was aware of these factors.<sup>28</sup> Evidence showed that it had taken all reasonable measures to deal with the oil and to prevent fire hazards. Moreover, it was held that, since the oil was not specially inflammable and its presence was obvious to the ship's master, the Harbour Trust

27. (1950-1951) 83 C.L.R. 353. On 1st November, 1943, The Edendale caught fire close to where the S.S. Panamanian was berthed. It was believed to have been caused by the presence of oil on water: ibid., pp. 378-379.

28. In fact, the "reports showed beyond question that the harbour authorities and the naval authorities considered that the oil which appeared irregularly and in large quantities on the surface of the harbour was a real fire danger": per Latham, C.J., ibid., p. 380.

was not liable for failing to prevent damage to shipping or to give warning of the presence of oil.

The duty and the standard of care to be exercised by Australian port and harbour authorities at common law are far from satisfactory. In the context of modern-day level of shipping activities and maritime commerce, the High Court decision has serious implications. It means that users of port and harbour facilities are not protected by the tort of negligence where damage or loss is caused by oil on the water or an outbreak of fire. The users include cargo-owners, stevedores, shipowners and ship operators. Marine underwriters, who need to reduce their losses by way of subrogation, are among those adversely affected where the tort remedy does not avail them. Moreover, others, whose property is polluted by oil carried by the action of winds and currents from port and harbour waters, will have no redress.

In another respect, the High Court decision is unsatisfactory. The plaintiff shipowners also failed in their negligence suit against the Commonwealth. In the opinion of the High Court Judges, the evidence presented was insufficient to establish any negligent act or omission by any person for whose conduct the Commonwealth was responsible. It is submitted that the standard of proof required is grossly inconsistent with the current policy, both national and world-wide, to reduce oil spills. The difficulty in adducing sufficient evidence would also stand in the way should the plaintiffs decide to sue in negligence the owners of the ships from which the oil was discharged.

That the judicial system is slow to remedy defects in law is evidenced by the case of Eso Petroleum Co. Ltd. v. Southport Corporation.<sup>29</sup> This House of Lords decision was delivered about five years after the High Court of Australia decision. It merely continued the trend of requiring plaintiffs, as victims of pollution damage, to meet a somewhat harsh burden of proof. The stranding of the Inverpol was itself presumptive of negligent navigation, calling for an explanation. But both Delvin, J., and the House of Lords accepted the master's

29. [1956] A.C. 218.

explanation that it was due to a defect in the ship's steering mechanism. There was no onus on him to prove further that the defect was not due to his fault. Their Lordships saw no basis to distinguish between the burden of proof in oil-pollution cases and ordinary negligence suits. Under English law, at any rate, the principle laid down by the House of Lords in Woods v. Duncan<sup>30</sup> determines the onus to be discharged by a defendant. Thus, if he "can satisfy that he personally was not negligent, he does not have to explain how the accident occurred."<sup>31</sup> One criticism to be levelled against this approach is failure by judges to take into account the ever increasing hazards and mounting clean-up costs. If the tort of negligence is to be relevant in redressing wrongs caused by oil pollution, the courts have to take into account the crises and re-define the duty of care.<sup>32</sup> It is suggested that, where stranding or a spillage is shown to be due to defects in a ship, it should be incumbent upon the master to prove that they are not attributed to his fault.

This tort suffered another very serious setback in the case of The Wagon Mound (No. 1).<sup>33</sup> The Privy Council upheld the decision of the trial judge Kinsella. Although the fire damage to the wharf and equipment was the direct result of the escape of oil, it was held to be outside the foreseeability test and therefore too remote. It was held that the demise charterers (O Ltd.) of the ship could not reasonably be expected to have known that oil on water would catch fire.

Fortunately, the devastating effects of the decision, which was binding on Australian courts, were removed five years later in the case of The Wagon Mound (No. 2).<sup>34</sup> Except that the two ships damaged by fire belonged to different parties, the cause of the action arose basically out of the same facts as in The Wagon Mound (No. 1). The shipowners (M. Ltd.) appealed against Walsh J.'s decision based

30. [1946] A.C. 401.

31. Per Devlin, J. whose judgment is reported: [1956] A.C. 218, p. 232.

32. As to the duty of care to be observed in relation to the magnitude of the risk, see Winfield and Jolowicz on Tort (11th ed. 1979), op. cit., pp. 91-92; R.F.V. Heuston, Salmond on the Law of Torts, (17th ed. 1973), pp. 226, et. seq.

33. [1961] A.C. 388.

34. [1967] A.C. 617.

on negligence, given in the Supreme Court of New South Wales. In The Wagon Mound (No. 2), findings different from those in The Wagon Mound (No. 1) were arrived at. The former show that "some risk of fire would have been present in the mind of a reasonable man in the shoes of the ship's chief engineer."<sup>35</sup> It is interesting to note that in allowing the appeal of M Ltd., the Privy Council re-defined the meaning of "foreseeable" and "reasonably foreseeable" in the light of the hazards posed by oil spillage. In delivering the Privy Council judgment, Lord Reid said:<sup>36</sup>

"...the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer of the Wagon Mound would have known that there was a real risk of the oil on the water catching fire in some way: if it did, serious damage or other property was not only foreseeable but very likely...The most that can be said to justify inaction is that he would have known that this could only happen in very exceptional circumstances...If it is clear that a reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant [i.e. O Ltd.] is liable in damages."

The reasoning in this case has given rise to fresh hopes. Apparently, judges are coming to grips with the fact that the static principles of common law are not meeting the problems created by the frequent movement of oil in bulk across national and international waters. Their Lordships emphasised that in the light of previous occurrences it is possible to ignite oil on water. Recognition of this highly dangerous propensity of oil on water is only the first stage of the judicial process. For the tort of negligence to be a viable remedy, the underlying concepts must be adapted to the current developments. New criteria will have to be worked out to protect the rights of those adversely affected by pollution.

The stress placed on the development of this tort is in line with the present tendency of common law "not only to move further and further away from strict liability but more and more to assimilate nuisance and negligence."<sup>37</sup> The modern trend is so geared towards a

35. Ibid., p. 641.

36. Ibid., pp. 643-644.

37. Clerk and Lindsell on Torts (14th ed. 1975), para. 1409.

more comprehensive action in negligence that it is questionable whether the action in nuisance can be separated from negligence.<sup>38</sup>

A move in that direction is seen in the recent case of The "Amoco Cadiz"<sup>39</sup> decided by a United States District Court. This "complex, multidistrict litigation" was occasioned by the grounding of an oil tanker and the consequent spillage of its cargo of oil in March 1978, off the French coast. Before the grounding incident, a West German salvage tug owned and operated by Bugsier had attempted to assist her. Actions for pollution damage and clean-up costs were brought in the United States by a host of plaintiffs, e.g. the French Government, government departments, municipalities and private individuals. The grounding was largely attributed to the failure of the tanker's steering gear when she encountered rough seas and severe winds. The thoroughness with which the various causes of the disaster were investigated shows the enlightened approach by American courts to the problems of pollution. It is interesting to note how in upgrading the tort remedy the court succeeded in attributing fault to the conduct of several of the parties sued.

Firstly, the Spanish shipyard, AE, was held liable in part for the pollution damage. The court found that the design and construction faults of the steering gear had contributed to the grounding. There was evidence that the American Bureau of Shipping (ABS) had certified that the steering gear complied with all applicable rules. It is noteworthy that such certification did not absolve AE from liability for its own negligence. Secondly, AIOC had complete control over the operation, management and repair of the tanker and also the selection and training of its crew. It was held to be negligent in failing to ensure that the vessel, particularly her steering gear, was in a seaworthy condition and adequately maintained in proper repair. Moreover, the crew's inability to re-establish control after the steering gear breakdown was due to AIOC's failure to instruct and train them

38. M.A. Millner, Negligence in Modern Law (1967 ed.), pp. 180-190.

39. [1984] 2 Lloyd's Rep. 304. The action was brought by the French Government in the United States.



to cope with the situation in an emergency. As a pragmatist reformer, McGarr, J., pushed the duty of care one stage further. AIOC was found negligent in operating the tanker without an alternative steering mechanism or other means of controlling the rudder "in the event of complete failure of the hydraulic steering system."<sup>40</sup> AIOC's negligence in the respects stated was held to be the proximate cause of the grounding of the tanker and the resulting pollution damage.

Thirdly, ATC, as registered owner of the tanker, was held to be liable for AIOC's negligence, and also for its failure to ensure the seaworthiness of the vessel and supervise the crew training on board. ATC's liability was without limitation<sup>41</sup> since it was unable to prove that it was free from privity and knowledge as regards the negligence which proximately caused the grounding of the vessel.

Two other aspects of the decision merit consideration. Bugsier, which attempted to salvage the tanker, was also sued in negligence by the French departments for the pollution damage and clean-up costs. It may be observed that while developing this tort as a viable remedy, the learned judge was careful not to find fault with the way the salvage operations were carried out. The inference is that the duty of care expected of salvors is less onerous than that required of the parties considered above. This important differentiation is consistent with the public policy of encouraging salvage efforts. In his view, Captain Weinert's unwise towing strategy, which was an act of misjudgment, did not constitute "culpable negligence" under the circumstances.<sup>42</sup>

An amusing line of defence was adopted by AE, AIOC and ATC and another. It asserted counter-claims and third-party claims against

40. Ibid., p. 338.

41. Under the International Convention on Civil Liability for Oil Pollution Damage 1969 which was part of French law but "not a United States law": ibid., p. 337. This Convention and its Protocol are given the force of law in Australia under the Protection of the Sea (Civil Liability) Act (Comth.) (No. 31 of 1981).

42. [1984] 2 Lloyd's Rep. 304, p. 316. Cf. The Jade (The Escher-sheim) [1976] 1 A11 E.R. 441 (C.A.) where the salvors' application to have the writs in the two actions against them set aside was dismissed.

the French Government, government departments and municipalities for their negligence in failing to prevent or contain the oil spill. McGarr, J., had no difficulty in rejecting these claims as "unfounded in law and in fact". He explained the grounds in these words:<sup>43</sup>

"No duty which France may have had to its citizens can run to the benefit of [AE, AIOC, ATC, etc.]. No action or lack of action on France's part could result in a right accruing to [AE, AIOC, ATC, etc.] to sue for lack of planning or ineffectual clean-up efforts."

A polluter is, however, not liable for damage occasioned by any inept clean-up efforts which have in fact aggravated the harm.

The principles laid down in this case, if followed by Australian courts, could constitute the initial step in building up a body of law to redress the wrongs inflicted by polluters. The tort of negligence does not as yet furnish answers to many of the pressing problems. Some examples are given. Firstly, it is uncertain how far the foreseeability test laid down in The Wagon Mound (No. 2) will enable pollution damage and clean-up costs to be recovered.<sup>44</sup> Should the same rule as to remoteness of damage apply to claims for pollution damage? Secondly, with regard to contributory negligence, there must be specific rulings made as to the nature or extent of the pollution threat that justifies preventive steps to be taken. If the reasoning is acceptable it follows that the law must enable the costs of such preventive measures, if properly taken, to be recovered.<sup>45</sup> Thirdly, apart from the clean-up costs and the expenses incurred in preventing damage, the loss suffered in most cases, e.g. by pearl divers, motel operators, etc. is purely financial. It is questionable, whether on grounds of policy, Australian courts are prepared to allow such claims to be recovered

43. Ibid., p. 339.

44. It should be borne in mind that the Privy Council decision in this case only concerns liability for fire damage: [1967] A.C., pp. 640, 644.

45. The "Amoco Cadiz" [1984] 2 Lloyd's Rep. 304, p. 339, per F. McGarr, J.

in tort.<sup>46</sup> Fifthly, a judgment obtained in a personal action may be of little practical value where the defendant as a natural person or limited company is insolvent. The use of the Mareva injunction may be effective in preventing a defendant from promptly disposing of the ships or transferring them out of the court's jurisdiction.<sup>47</sup>

### 3. Strict Liability

We shall now consider whether the rule in Rylands v. Fletcher can be taken advantage of in actions for pollution damage. This "strict liability" tort appears to have great potential since negligence or fault is not an element. In Eastern Asia Navigation Co. Ltd. v. Fremantle Trust Commissioners<sup>48</sup> reliance was placed, *inter alia*, on the rule. The owners of the S.S. Panamanian contended that the Commonwealth or the Harbour Trust accumulated dieselene, or allowed it to be accumulated in ships, and that the fire damage caused was the consequence of its escape. Since it has been recognised that bunkering oil or dieselene is a dangerous substance due to its tendency to ignite, one of the requirements of the tort was thus satisfied. All the other elements, including the escape and damage as a consequence thereof, were present, except one. Both Latham, C.J., and Kitto, J., held that the rule had no application. Bringing fuel oil to a berth in a harbour and there dealing with it as fuel for oil-burning vessels were held as an accepted incident of an ordinary purpose, to which the berth was reasonably applied. The action failed on the ground that carrying fuel oil on ships into berths was somehow recognised as a natural use thereof. Sea lanes, both national and international, could be placed in the same category as berths. It may imply that no liability can arise under the rule in Rylands v. Fletcher<sup>49</sup> for allowing oil to escape from a ship or tanker while proceeding along one

46. The High Court of Australia pronouncements in Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1977) 51 A.L.J. R. 270 indicate that the path of change is not an easy one. See the Supreme Court of Canada decision in Rivtow Marine Ltd. v. Washington Iron Works (1973) 40 D.L.R. (3d.) 540.

47. See F.D. Rose, "The Mareva Injunction - Attachment in Personam - Part I" [1981] 1 L.M.C.L.Q. 1.

48. (1950-1951) 83 C.L.R. 353.

49. (1866) L.R. 1 Ex. 265. This "strict-liability" rule was not considered in The Wagon Mound [1961] A.C. 388, p. 427.

of the lanes ordinarily used by such vessels. There is another obstacle that stands in the way. It has been said that it must be an escape from the defendant's land and not an escape from a ship.<sup>50</sup> Moreover, oil is carried on ships either as fuel or as cargo in bulk. It is inconceivable for a court to rule that it is a non-natural use of a wharf, berth or sea-lane on the ground that the ship involved has on board a large quantity of oil.

It is unlikely that under Australian and English laws this tort will, in the foreseeable future, develop into an adequate remedy for pollution damage due to oil spills from ships.

#### 4. Reforms

It has been observed that actions at common law are inadequate in many ways. They suffer the grave limitation of treating human individuals as being solely responsible for the consequences of oil spills. Since the pollution is largely ship-sourced, though human agency is present, the mechanical approach of common law is not a viable proposition.

It is submitted that the problems should be dealt with by the application and, wherever necessary, the extension of maritime law principles. The present tendency of the law to assimilate nuisance and negligence has been noted. Provided the spillage occurs from a ship, pollution damage, whether actionable in nuisance or negligence, should render the ship liable as a res. A lead in this direction featured in the Canadian case of Outhouse v. The Thorshaun.<sup>51</sup> Here oil which was part of the ship's cargo was pumped overboard. Damage was caused to lobsters. The Canadian Exchequer Court held that the remoter consequences of jettisoning oil from a ship amounted to "damage done by a ship". An action in rem was permitted within section 6 of the Admiralty Court Act 1861 (Imp.).<sup>52</sup>

50. Miller Steamship Co. Ltd. v. Overseas Tankship (U.K.) [1963] 1 Lloyd's Rep. 402, p. 426. However, the authorities have established that it is unnecessary for the defendant to have any property interest in the land: Benning v. Wong (1969) 122 C.L.R. 249, p. 294, per Windeyer, J.

51. [1935] 4 D.L.R. 628.

52. 24 Vic., c. 10, infra. It is submitted that "damage" within s. 6 should include a claim for special damages suffered by a plaintiff in cases of public nuisance.

Support for this trend has come from a recent decision of the English Court of Appeal in The Jade.<sup>53</sup> A collision which occurred some fifty miles off the Spanish coast had totally disabled the ship Erokwit. The tug Rotesand towed the Erokwit and beached her. Both the ship and her cargo, including a quantity of insecticide, became total losses. The insecticide was washed into the sea. The Spanish government alleged on behalf of fishermen that the pollution of the sea had caused great damage to their interests. It claimed heavy damages against the Erokwit owners and against the salvors. When the proceedings were still pending, the Erokwit owners and the cargo owners brought actions in rem in the Admiralty Court in England against the salvors. The damages claimed by the Erokwit owners against the salvors for negligence included an indemnity against any liability to the Spanish government. Brandon J.'s dismissal of the salvors' application to strike out the Erokwit owners' claim for indemnity was upheld. The English Court of Appeal held that under section 1 (1) (d) of the Administration of Justice Act 1956 (U.K.)<sup>54</sup> the Erokwit owners and the cargo owners were entitled to pursue the claim in rem against the tug Rotesand. In their Lordships' judgments, the tug Rotesand was the active cause of the damage. Cairns, L.J., applied<sup>55</sup> the principle of Lord Bowen who had stated: "'Damage done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument."<sup>56</sup> The reasoning of Scarman, L.J., and Sir Gordon Willmer, J., is promising. It shows positive signs that in England the right to sue in rem is being extended to cover pollution damage. According to them, if the pollution had resulted from the beaching of the Erokwit, her owners were entitled to include in the action brought under section 1 (1) (d) a claim for consequential loss arising from their potential liability in

53. (The Eschersheim) [1976] 1 A11 E.R. 441 (C.A.).

54. It read: "The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims...(d) any claim for damage done by a ship...." It has been replaced by a similar provision in the Supreme Court Act 1981 (U.K.) (c. 54), s. 20 (2) (e).

55. [1976] 1 A11 E.R. 441, p. 449.

56. The Vera Cruz (1884) 9 P.D. 96, p. 101.

the Spanish proceedings for pollution.<sup>57</sup> In effect, the decision takes cognizance of the rights of third parties to institute proceedings in rem for pollution damage caused by negligence in salvage work. It is a short step to recognizing similar rights where the spillage arises from a collision. It is envisaged that the ship, which is at fault, will be held liable in admiralty actions in rem to the owners of the other ship and the pollution-damage claimants.

One difficulty with common law actions is the task of identifying the persons responsible.<sup>58</sup> There can be the disappointment that the persons, including limited companies operating as demise charterers, against whom judgment is obtained may turn out to have no financial resources. On the other hand, little difficulty is encountered in tracing a spillage to a particular ship as the source. Proceedings in rem offer several outstanding advantages over personal actions at common law. The ship or tanker, when arrested and successfully proceeded against, will constitute a valuable asset for the payment of claims. Moreover, where "sister ship" or "surrogate ship" actions are permitted, subject to certain conditions being satisfied, the claims may be pursued against other ships which are under demise charter to, or owned by, the same company or person. Where a ship is arrested, her owners will have to put up security or provide satisfactory guarantee before she is released. There is no way by which her owners could meanwhile defeat the object of the proceedings by means of collusive dealings to put her out of the claimants' reach.

If the rights to recover compensation for pollution damage are to be subsumed under maritime law, one important issue has to be resolved. It is true that to succeed in the action in rem negligence or fault will still have to be proved as in an action for collision damage.

57. [1976] 1 A11 E.R. 441, p. 443. In the trial court, however, Brandon, J., held that the Administration of Justice Act 1956 (U.K.), s. 1 (1) (e) (i.e. "any claim for damage received by a ship") covered consequential as well as direct loss: [1974] 3 A11 E.R. 307, p. 315.

58. This is because, apart from the registered owners, a number of other persons may have possession and use of the ship.

It is crucial that the foreseeability rule should be re-defined so as to incorporate all loss or damage which, in the ordinary course of events, has resulted from the spillage. Such notorious incidents as the Torrey Canyon, the Amoco Cadiz, the Eleni V/Roseline,<sup>59</sup> etc. could provide judges with suitable material to formulate an appropriate foreseeability test to apply to pollution damage. Although clean-up costs should invariably be included, it is questionable how far expenses and liabilities incurred in taking preventive measures should be recoverable.<sup>60</sup> At present, there are no Australian case authorities dealing with these claims under maritime law.

The proposed reforms seem to be in line with the object of the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.<sup>61</sup> Article 1 paragraph 1 (b) covers damage to property or infringement of any rights caused by the act, neglect or default of any person on board the ship in the navigation or the management of the ship and so forth. It is arguable that the wording is wide enough to confer the benefit of limitation of liability on shipowners for pollution damage. In order to come within the provision, it is not necessary for the spillage to have come from, or been caused by, a ship. It may have come from a fuel storage tank situated at a wharf. This can occur in consequence of a negligent collision caused by a ship. The pollution damage is nevertheless attributed to the act, neglect or default of a person or persons on board the ship<sup>62</sup> to be proceeded against. In terms of liability and in the admiralty action in rem the ship and the person or persons at fault are treated as one party.<sup>63</sup> This reasoning is logical when two inter-related factors are borne in mind. Firstly, the act or neglect which causes the

59. For the incidents involved, see supra.

60. State and Commonwealth legislation to deal with the current gaps in common law will be considered in due course.

61. As regards its operation as law in Australia, see Chapter Eight.

62. Article 6 paras. 2 and 3.

63. This seems to be the thrust of the provisions in Article 6.

spillage must be that of a person or persons on board the ship. Secondly, the act or neglect must have occurred in the working, employment or some operation of the ship. The philosophy behind the 1957 Convention is the protection of all those persons who own, charter, manage or operate ships, or work on them.

Once it is accepted that pollution damage is damage done by a ship or within the admiralty jurisdiction of the court, then the costs of cleaning up and preventive measures taken should also be limited. It appears that at present there is no law in Australia that limits such liability although it may be recognised to have been incurred at common law. It is desirable to amend the law along the lines of the United Kingdom's legislation.<sup>64</sup> The amendment should provide that the costs of cleaning up and preventive measures as well as further damage caused are damage or loss within the meaning of Article 1 paragraph 1 (b) of the 1957 Convention.

The subsumption of claims for pollution damage under maritime law principles will also provide a further benefit to shipowners and others involved. Under maritime law, the owners of a ship, which is arrested in an admiralty action *in rem*, can escape personal liability by not entering an appearance. This course of action has the result of limiting their liability by abandoning the *res*.<sup>65</sup>

The changes proposed may prove to be of benefit to the parties involved in pollution-damage suits.

64. Merchant Shipping (Oil Pollution) Act 1971 (U.K.) (c. 59), s. 15 (2), as amended by the Merchant Shipping Act 1979 (U.K.) (c. 39), Schedule 5 para. 6 (2).

65. The Dictator [1892] P. 304; The Dupleix [1912] P. 8, *infra*. Cf. Draft Admiralty Bill 1985, clause 31 (1). It appears that, if this clause is implemented as law, such a method of limiting liability may not avail. This is the case where the defendant, as the relevant person in relation to the maritime claim, is personally liable on the judgment.



### III. STATE CONTROL OF OIL POLLUTION

#### 1. Explanatory Note

The State Parliaments have passed two types of legislation to control and minimise the harmful consequences of pollution.<sup>66</sup>

We shall first look at the penal nature of the measures introduced by the first type. After their effects have been analysed, we shall consider the possibility of extending the principles of maritime law as part of the control mechanisms. The purpose is to achieve greater efficiency and provide adequate redress for pollution damage.

The second type of legislation is characterised by a different approach.<sup>67</sup> Although penalties are imposed for non-compliance, the legislation also provides for a wide range of actions and measures to be taken. An attempt is made to evaluate them and, wherever possible, compare them with certain common law remedies. Our object is to examine whether in the exercise of the wide statutory powers by public bodies and government officials the rights and interests of third parties as recognised by maritime law are adversely affected. We shall then be able to consider the reforms.

It is interesting to note that, in dealing with pollution problems, a number of States have had an early lead over the Commonwealth.<sup>68</sup> The State enactments, which are fairly similar, give effect to the

66. Prevention of Oil Pollution of Navigable Waters Act (N.S.W.) (No. 48 of 1960), as amended by Act (No. 59 of 1973); Pollution of Waters by Oil Act (Qld.) (No. 33 of 1973); Prevention of Pollution of Waters by Oil Act (S.A.) (No. 34 of 1961), as amended by Acts (No. 51 of 1969, No. 87 of 1972 and No. 24 of 1979); Oil Pollution Act (Tas.) (No. 15 of 1961), as amended by Act (No. 41 of 1964); Navigable Waters (Oil Pollution) Act (Vic.) (No. 6705 of 1960), as amended by Acts (No. 7890 of 1969, No. 8334 of 1972 and No. 8816 of 1975); Prevention of Pollution of Waters by Oil Act (W.A.) (No. 33 of 1960), as amended by Acts (No. 16 of 1967 and No. 82 of 1973).

67. It creates new civil liability which is discussed in due course.

68. The Pollution of the Sea by Oil Act (Comth.) (No. 11 of 1960) was not brought into operation until 1st October 1962. See Commonwealth of Australia Gazette No. 81, 27th Sept. 1962.

kernel provisions of the International Convention for the Prevention of Pollution of the Sea by Oil 1954.<sup>69</sup> A State enactment will only apply within the State jurisdiction defined as "the sea lying within the territorial limits, the ports and tidal rivers, and the inland navigable waters" of the State.<sup>70</sup> However, it extends to a discharge or escape of oil or any mixture containing oil anywhere which may result in "any part of such oil or mixture" entering any waters within the jurisdiction. The words "any part of such oil or mixture", when literally construed, may mean that neither the extent of dilution nor the lapse of time taken for the pollutants to come within a State jurisdiction could constitute a defence. At the outset, the nature of the liability imposed by the Acts for contravention should be borne in mind. The words used in the Acts, e.g. "guilty of an offence", "charged", "penalty" etc. suggest the criminality of every prohibited or unlawful discharge. However, in Alphacel Ltd. v. Woodward,<sup>71</sup> where section 2 (1) of the Rivers (Prevention of Pollution) Act 1951 (U.K.) was involved, the House of Lords held that the offence created was in the nature of a public nuisance and not strictly criminal.

A reference to Commonwealth legislation should be made at this juncture. Under section 10 (1) of the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.),<sup>72</sup> the wide-ranging measures that

69. In Maritime Services Board of New South Wales v. Posiden Navigation Incorporated; Maritime Services Board of New South Wales v. Liberian Cross Transports Incorporated [1972] 1 N.S.W.L.R. 72, Yeldham, J., observed: "However, because the Prevention of Oil Pollution of Navigable Waters Act 1960, was not, nor were the amendments of 1973, passed to give effect to any International Convention, it is not permissible to have regard to the terms of any such Convention in construing either s. 7 E (3) of s. 8 (1):" *ibid.*, 82. See, however, Pollution of Waters by Oil Act 1960 (Qld.) (repealed), s. 3 (1).

70. Act (N.S.W.) (No. 48 of 1960), s. 4 (1); Act (S.A.) (No. 34 of 1961), s. 3 (1); Act (Vic.) (No. 6705 of 1960), s. 4 (1); Act (W.A.) (No. 33 of 1960), s. 3 (1); *cf.* Act (Tas.) (No. 15 of 1961) s. 2, and Act (Qld.) (No. 33 of 1973), s. 7 (1).

71. [1972] A.C. 824.

72. Act No. 33. S. 8 (5), however, reserves to the Commonwealth the exercise of other legal powers.

may be taken do not extend to intra-State trading ships and Australian fishing vessels which are not proceeding on an overseas voyage. The Protection of the Sea (Civil Liability) Act 1981 (Comth.),<sup>73</sup> which gives effect to the 1969 Convention and the Protocol, only applies to ships actually carrying oil in bulk as cargo.<sup>74</sup> As the State enactments are not displaced,<sup>75</sup> they operate alongside and in some cases supplement the Commonwealth legislation.

## 2. Persons liable

What is unsatisfactory is the lack of consistency under the State Acts as to who may be liable to be convicted when a discharge occurs from a ship. The simplistic approach adopted by the New South Wales Act is that both "the owner and the master"<sup>76</sup> shall be guilty of an offence. It is possible that the unclear wording may result in both being separately charged and penalised for a single contravention. One can see the staggering crudeness of such interpretation where a ship, from which a discharge occurs, is owned and captained by the same person. One example of harsh judicial response to public policy is found in the English case of Federal Steam Navigation Co. Ltd. and Another v. Department of Trade and Industry.<sup>77</sup> Section 1 (1) of the Oil in Navigable Waters Act 1955 (U.K.), as amended, was involved. It read: "If any oil to which this section applies is discharged from a British ship...the owner or master of the ship...shall be guilty of an offence under this section". The House of Lords held that the word "or" in section 1 (1) was used conjunctively, and not in an alternative and exclusionary sense. In affirming the Court of Appeal decision, the House of Lords held that the owner and master could each

73. Act No. 31, which gives effect to the International Convention on Civil Liability for Oil Pollution Damage, 1969.

74. Ibid., Article 1 para. 1.

75. Commonwealth of Australia Constitution Act 1900 (Imp.), s. 109, supra.

76. Act (N.S.W.) (No. 48 of 1960), s. 6 (a). With the exception of Victoria, Act (No. 6705 of 1960), s. 6 (a) and Tasmania, Act (No. 15 of 1961), s. 3 (a), the other three States have identical provision.

77. [1974] 2 All. E.R. 97.

be convicted of an offence.

Unless the continued use of "the owner and the master" is intended as a legislative policy to impose vicarious liability, the expression disregards all other persons who may have caused the discharge.

Firstly, the bunkering aspects of ship management are under the charge of the ship's engineers appointed according to the requirements of law.<sup>78</sup> It is difficult to see why they should be immune from prosecution. Secondly, a ship under a demise charter is in the possession and control of the charterer. All the crew members on board are deemed to be his employees.<sup>79</sup> In such circumstances, it is grossly unjust for the owner to be made a scapegoat. A reasonable ground for imposing statutory liability on a person as an owner is where the ship, on a demise charter to an Australian national or an Australian-incorporated company, is registered under the Shipping Registration Act 1981 (Comth.). However, the Act does not render it compulsory that a foreign or Australian-owned ship under a demise charter must be registered in the charterer's name.<sup>80</sup> Apart from the inconvenience and registration fees entailed, few shipowners favour such a course of dealing. Thirdly, there is a further shortcoming with regard to the use of the word "owner". In exercising his rights under the mortgage agreement, a mortgagee of a ship may seize her and put her to commercial use to generate income. An oil discharge or escape may occur after a mortgagee has taken possession of the ship.

The Tasmanian Act<sup>81</sup> is credited with the earliest foresight of envisaging the shortcomings. It has consistently adopted as the definition of "owner" the same meaning as in the Marine Act.<sup>82</sup> An owner "includes the charterer and any person having the possession of such

78. As to certificates of competency for various grades of engineers, see Navigation Act 1912 (Comth.), s. 15.

79. See R.P. Colinvault, Carriage by Sea, (12th ed. 1971), vol. I, para. 321, and the case authorities cited.

80. Shipping Registration Act 1981 (Comth.), ss. 9 and 14 (d), *supra*.

81. Act (Tas.) (No. 15 of 1961), s. 2.

82. Act (Tas.) (No. 18 of 1976), s. 4 (1).

vessel and any agent for a vessel, which is or has come within the jurisdiction of a board or trust, if such agent is the public or recognised agent for the owner of such vessel".<sup>83</sup> The wide meaning given to the expression will extend to all charterers, demise and non-demise, mortgagees in possession and in some cases agents.

The inclusion of "agent" in the definition shows cognizance of shipping practice,<sup>84</sup> as an agent is usually stationed in an overseas port to manage the ship's business, particularly in her owners' absence. In the South Australian case of Dalgety (Australia) Ltd. v. Griffith (No. 2)<sup>85</sup> the appellants, a limited company, pleaded guilty to a charge under section 5 of the Pollution of Waters by Oil Act 1961-1979 (S.A.). They were the agent for the ship, m.v. Afrodite, which discharged a fairly large quantity of oil into the waters of St. Vincent's Gulf near Port Stanvac. In allowing the fine of \$10,000 to be reduced to \$7,000, despite the wide meaning given to "agent", Matheson, J., appears to have been influenced by two factual findings. The spillage was probably caused by the inadvertence of a crew member and the appellants were not shown to be responsible for the ship's management. It is submitted that if the two factors had been fully pleaded in defence before the magistrate, the case could have been dismissed.

It appears that the position of an agent will depend on the meaning of the term, the responsibility attributed to him by the Act and the actual authority given to him. This view is reflected in Goods v. James Patrick & Co. Pty. Ltd.<sup>86</sup> The defendant was prosecuted under section 6 (a) of the Victorian Navigable Waters (Oil Pollution) Act 1960. The provision renders, inter alia, the agent of a ship, which discharges oil;

83. The word "master" is defined in Act (N.S.W.) (No. 48 of 1960), s. 4 (1). For definition of "owner", see also Act (S.A.) (No. 34 of 1961), s. 3, as amended by Act (No. 51 of 1969), s. 2; Act (W.A.) (No. 33 of 1960), s. 3 (1), as amended by Act (No. 82 of 1973), s. 3 (b).

84. Act (S.A.) (No. 34 of 1961), s. 5, as amended by Act (No. 24 of 1979), s. 5 (1) and (2); an agent of the ship is jointly and severally liable for a discharge.

85. [1980] 26 S.A.S.R. 257.

86. [1963] V.R. 334.

into waters within the jurisdiction, guilty of an offence. The magistrate dismissed the information. He found that the words "agent of a ship" meant a general agent and that the defendant's authority was limited to the arranging of berthing of the ship and matters incidental thereto. In the Supreme Court, Adam, J., dismissed an order to review the magistrate's decision. He said:<sup>87</sup>

"I think the only conclusion open on the evidence was that the defendant was not an agent of an unlimited authority, and in fact did not possess the authority which was essential to make him 'agent of the ship' for the purposes of the Act."

Adam J.'s dismissal of the order is supportable on the ground that the agent lacked the elements of possession and control.

A situation can arise where a discharge occurs from a ship while it is being salvaged. In carrying out salvage work, salvors have certain rights of custody and control in respect of the ship and cargo. Their action or operation could have caused an oil discharge or escape from the ship. Unless they are deemed to have had possession at the material time<sup>88</sup> when the discharge occurs, they cannot be convicted under the Tasmanian Act.<sup>89</sup> A similar consideration applies to ordinary charterers and ship mortgagees, who do not have possession of the ship.

The legislatures of Victoria<sup>90</sup> and Queensland<sup>91</sup> have regarded marine pollution as such a serious matter that they have extended the dragnet. For example, it is conceivable that a discharge from ship "X" during transfer operation may have occurred due to an act or omission committed on ship "Y" or in connection with a transfer apparatus. In Tucker v. Riverside Coal Transport Pty. Ltd., ex parte Tucker,<sup>92</sup> the Full Court of the Supreme Court of Queensland construed the ambit of sections 9 and 10 (2) of the Act. It was held that in respect

87. [1969] V.R. 334, pp. 337-338. In effect, Matheson, J., endorsed the reasoning of Adam, J.: [1980] 26 S.A.S.R., pp. 259-260.

88. As to the possessory lien of salvors, see Chapter Seven.

89. The provision has been referred to previously.

90. Act (Vic.) (No. 6705 of 1960), ss. 6 and 6A, as amended.

91. Act (Qld.) (No. 33 of 1973), ss. 9 and 10.

92. [1982] Qd. R. 181.

of one discharge from ship "X" a person or persons may be charged under section 9, while the shipowners and the master of ship "Y" and the person in charge of the apparatus may also be charged under section 10 (2). If, in such circumstances, the discharge from an apparatus is caused by an act or omission committed on a ship the owners and the master will also be chargeable.

For the purpose of the person to whom notice may be given in cases of pollution, the Environmental Protection Act (W.A.)<sup>93</sup> has adopted an interesting and comprehensive definition. Section 76 (1) defines the "owner of the source" to include "the owner, charterer or master of any ship and any person having an estate, right, or interest in any property from which waste is discharged...." It is submitted that the owner of a cargo of oil which leaks and the salvor of a stranded vessel from which pollutants escape into the water would also be within the definition. The State enactments control pollution by imposing penalties on the person who causes or permits the unlawful discharge.<sup>94</sup> In this respect they differ from the prevention of oil pollution Acts. Nevertheless, it is plausible that, in respect of a single discharge, the actual offender may be found guilty under one Act while the owner, charterer or master of the ship may be found guilty under another Act.

### 3. Defences

Under the State enactments, the penalty of \$A50,000 may be imposed for an unlawful discharge.<sup>95</sup> The statutory defences are especially important.

Discharge - when justifiable. It is a defence for a person charged

93. Act (No. 63 of 1971).

94. See e.g., Environmental Protection Act (W.A.), No. 63 of 1971, s. 80; Environmental Protection Act (Vic.), No. 8056, s. 20; Environmental Protection Act (Tas.), No. 34 of 1973, s. 16. Where any conflict arises between the provisions of the environmental protection Act and those of the prevention of oil pollution Act, the former shall prevail in Western Australia: 1971 Act, s. 7 (1); the position is the opposite in Tasmania: 1973 Act, s. 3 (2).

95. The Commonwealth Parliament has raised the penalty to \$10,000 in the case of corporate owners: Protection of the Sea (Discharge of Oil from Ships) Act 1981, ss. 12 (2) (c) and 14 (2) (c); and Protection of the Sea (Civil Liability) Act 1981, s. 22 (3) (c).

to prove that -

"the discharge of oil...was necessary for the purpose of securing the safety of the ship, or of preventing damage to the ship or cargo or of saving life, and was a reasonable step in the circumstances."<sup>96</sup>

It is clear that an accidental or negligent discharge is not protected. In Glover v. McDougall, Yeldham, J., pointed out the senses in which the terms are used as follows:<sup>97</sup>

"It is apparent that 'discharge' is wider in its meaning than 'escape' and 'leakage'. By definition it includes escape, but there are some discharges...which are not termed escapes. In the same way all leakages are escapes, and hence constitute discharges, but clearly many instances of discharge or escape do not amount to a leakage."

For this defence to apply, two conditions must be satisfied - namely, the necessity for the deliberate release of the oil and the reasonableness of such an act. The wording of the provision shows that the step or measure taken must be of a preventive nature.

The first condition may occur where a ship springs a leak or has developed a defect in her steering gear or engines. To prevent the ship sinking, stranding or breaking up or lives being lost, the master may order the ship's fuel oil or cargo of oil to be released into the sea. There may be situations where the jettison could constitute a general average sacrifice in shipping law. But for the purpose of the first condition, it is not necessary that the discharge must be for the benefit of the ship, the freight and the cargo. The statutory defence<sup>98</sup> based on what is reasonably necessary in the circumstances will usually not constitute a general average act.<sup>99</sup> In an admiralty action in rem against a ship by a cargo-owner, it is no

96. This defence is identical under all six State Acts, viz.: Act (N.S.W.) (No. 48 of 1960), s. 7 (1) (a); Act (Qld.) (No. 33 of 1973), s. 12 (1) (a); Act (S.A.) (No. 34 of 1961), s. 6 (1) (a); Act (Tas.) (No. 15 of 1961), s. 3; Act (Vic.) (No. 6705 of 1960), s. 7 (1) (a), and Act (W.A.) (No. 33 of 1960), s. 6 (1) (a).

97. [1976] 2 N.S.W.L.R. 359, pp. 364-365.

98. Cf. Southport Corporation v. Esso Petroleum Co. Ltd. [1956] A.C. pp. 227-228, (House of Lords) where it was held that at common law a person is justified in discharging oil into an estuary to save lives but not property.

99. For meaning of this term at common law and under the York-Antwerp Rules 1974, see Chapter Nine.



defence for her owner to prove that the cargo of oil or part thereof was discharged in order to save the ship, cargo or even life.<sup>1</sup> In the action the shipowner will, however, be protected if the cargo is regarded as dangerous goods<sup>2</sup> or where he can avail himself of an appropriate exception clause in a charterparty.

Escape - when justifiable. It is a defence for the person charged to prove that -

"the oil...escaped in consequence of damage to the ship and that all reasonable steps were taken after the occurrence of the damage for stopping or reducing the escape of the oil ...."<sup>3</sup>

The availability of this defence depends on several conditions being proved. Firstly, there must be damage sustained by the ship (or tanker), e.g. due to a collision or a severe storm. Probably the damage could have been intentionally caused by saboteurs or pirates. It is submitted that the defence will also apply where the damage, giving rise to the escape, has occurred in the absence of fault or negligence on the part of the shipowner, his servants,<sup>4</sup> or agents, e.g. salvors.

Secondly, the requirement that all reasonable steps be taken for preventing or reducing the escape may have serious implications. In some cases, it may constitute abandoning the ship, sacrificing the freight and destroying the cargo of oil together with other goods carried. Thus in the notorious Torrey Canyon incident, attempts to save her or tow her out to the mid-Atlantic failed. When she was later bombed and set afire to minimise the effects of further oil-slicks,

1. It is submitted that a justifiable discharge of the cargo under a State enactment will not constitute a deviation to save life within the meaning of Hague Rules, Article IV rule 4.
2. See Hague Rules, Article IV rule 6.
3. This defence is identical in the legislation of three States, viz., Act (N.S.W.) (No. 48 of 1960), s. 7 (1) (b); Act (Qld.) (No. 33 of 1973), s. 12 (1) (b) (i), and Act (Vic.) (No. 6705 of 1960), s. 7 (1) (b) (i). In the other legislation, to establish the defence additional ingredients must be proved.
4. If our submission is correct, then this aspect of the defence differs from the exception in Hague Rules, Article IV rule 2 (a).

the damage had already been done. More than fifty per cent of the entire cargo of crude oil had escaped into the sea. In view of the extensive damage done, the question is whether she should not have been destroyed by incendiary bombs earlier.<sup>5</sup> Precisely how soon should demolition by fire to contain the pollution be undertaken?

Obviously a number of difficulties will arise. Voluntary destruction of a ship or cargo in order to avail the shipowner, master or demise charterer the statutory defence will result in a breach of the principles of maritime law. Few underwriters will be prepared to issue insurance policies to cover losses arising in such circumstances.

Leakage - when justifiable. This defence applies where the escape arises -

"in consequence of leakage which could not have been avoided, foreseen and anticipated and that all reasonable steps were taken for prompt discovery of the leakage and after such discovery for stopping or reducing the escape of the oil or mixture."<sup>6</sup>

In a number of cases, the meaning of "leakage" was discussed and explained. In Nicholson v. Fremantle Port Authority, Wolff, C.J., considered that "leakage" in section 6 (1) (b) of the Act (W.A.) "is used in the sense of 'running away' or 'escape' of oil through a hole or crack."<sup>7</sup> A decision which deals with a similar provision but a different problem is Tucker v. Fraser, Ex parte Tucker.<sup>8</sup> There oil was being pumped from a fuel lighter into a ship's fuel tanker. It shot through the air-vent onto the deck and into the Brisbane River. The projection was caused by an air lock in the fuel tank, due possibly to the ship's movements during cargo loading operations. The Full Court of the Supreme Court of Queensland held that the discharge in the circumstances was not a "leakage" within section 12 (1) (b) (ii)

5. See report, April 1967 (Cmnd. 3242), op. cit., paras. 3 and 4.

6. Act (N.S.W.) (No. 48 of 1960), s. 7 (1) (b) (ii); Act (Qld.) (No. 33 of 1973), s. 12 (1) (b) (ii); Act (S.A.) (No. 34 of 1961), s. 6 (1) (b); Act (Tas.) (No. 15 of 1961), s. 4 (1) (b); Act (Vic.) (No. 6705 of 1960), s. 7 (1) (b) (ii), and Act (W.A.) (No. 33 of 1960), s. 6 (1) (b).

7. [1969] W.A.R. 27, p. 31.

8. [1974] Qd. R. 147.

of the Queensland Act. Wanstall, S.P.J., emphasised the qualities of passivity and stealthiness which the word "leakage" reflects in its natural meaning. D.M. Campbell, J., was of the view that "leakage should not be limited to an escape from a hole or fissure" but that it "could conceivably occur because of defective coupling."<sup>9</sup>

The word "leakage" was given a wider meaning in the New South Wales case of Glover v. McDougall.<sup>10</sup> The ship "Lisa Miller" was taking in bunkers at the Port of Sydney. Oil began to spray in a rose fashion out of the top of the flange, running out of the ship into the water. Yeldam, J., applied a twofold criterion in determining whether the escape was a leakage. The components were (i) escape through an opening not intended or permitted for the purpose, and (ii) escape in the form of a mere trickle.

The second requirement to be satisfied is that the leakage "could not have been avoided, foreseen or anticipated." It approximates in several ways to the exception of act of God at common law. Wanstall, S.P.J., in Tucker v. Fraser, Ex parte Tucker<sup>11</sup> stressed that "a tribunal of fact ought not be satisfied that a given leakage could not have been foreseen or avoided unless the evidence enables it to find and identify the probable cause of the leakage." In the discussions on the meaning of "leakages", the references to the manner of escape, e.g. "a mere trickle", "some element of gradualness", "stealthy escape", etc. show the difficulty rather than the impossibility of avoiding the leakages. The third requirement is the taking of all reasonable steps for prompt discovery of the leakage and for stopping and reducing the escape.

It is helpful to compare this defence with some of the exceptions available under the law of carriage by sea. At common law, the seaworthiness of the ship at the time of sailing and at each stage of the voyage is an absolute undertaking to be met by the shipowner. "It appears, then that the shipowner undertakes responsibility for any

9. Ibid., p. 151.

10. [1976] 2 N.S.W.L.R. 359, supra.

11. [1974] Qd. R., p. 150.

defects in the ship, or her machinery or equipment, even for defects not discoverable by careful examination."<sup>12</sup> One may reasonably assume that, where a charterer has to pay for the bunkers during the charter and they escape from the ship's engines or fuel tank, the implied warranty is breached. The fact that a shipowner is successful in establishing the defence under a State Act is therefore of no consequence under common law. Where a shipowner is a common carrier, he is under a strict liability in respect of any loss of or damage to the goods carried. He is answerable even where he can show that he has taken every possible care for the safe carriage of the goods. Two of the exceptions to this strict liability are the act of God and the Queen's enemies. Viscount Sumner explained the nature of these exceptions in F.C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.<sup>13</sup> He said:<sup>14</sup>

"When the common law makes the ship bear the risks of the voyage and all that may happen to the cargo in the course of it, but excepts the act of God, the King's enemies...the scheme is evident. Neither party can wholly guard against the act of God and the King's enemies, so the loss lies where it falls."

A leakage wholly attributed to an act of God or the King's enemies could well meet the first and second requirements. The same reasoning seems to apply whether the shipowner is a common carrier or a Hague Rules carrier.<sup>15</sup> But if it is possible for him to stop or reduce the escape of oil, e.g. by deviating to a nearby port or by obtaining salvage assistance, and he fails to do so, he will be found guilty under a State enactment. However, his conviction is no bar to his reliance on the two exceptions in an admiralty action against his ship brought by the cargo owners.

An escape may have come from oil shipped in large drums or containers provided by cargo owners. It is a principle of law that a shipowner, whether as a common carrier or Hague Rules carrier, is not

12. R. Colinvau, Carver's Carriage by Sea (12th ed. 1971), vol. 3, para. 107.

13. (1927) 27 Ll. L. Rep. 395.

14. Ibid., p. 399.

15. Hague Rules, Article IV rule 2 (d) and (f), i.e. act of God and act of public enemies, respectively.

prevented from taking on board for carriage goods which are known to be in a leaky condition. To succeed, the plaintiff has to prove not merely negligence on the part of the shipowner but also the extent of damage sustained as a result of that negligence.<sup>16</sup> It is quite likely that, because of the difficulty in meeting the burden of proof, the exception of "insufficiency of packing"<sup>17</sup> will apply in favour of the shipowner. On the other hand, a shipowner, who fails to prevent a discharge after becoming aware of the leaky condition of the cargo or defects in the container used, cannot avail himself of the defence under a State enactment.

#### 4. Position under Maritime Law

It has been seen that the State enactments follow a mechanical approach. They impose several penalties for pollution offences on the shipowners, masters and, in some cases, on other persons. The penal liability imposed is personal and vicarious. The spillage may have occurred when the ship is the possession and control of persons other than the owners. Such persons include the demise charterer, the salvor carrying out salvage work, the mortgagee in possession and the shipwright when testing the ship at sea. Each of these persons is recognised by law as having certain interests in the ship. It is therefore logical to treat the ship as the offending instrument. It is submitted that the State enactments should be amended to enable the appropriate authorities to enforce the penalties by instituting proceedings in rem against the ship.

It is noteworthy that the defences provided by the Acts do not necessarily correspond to those that may be raised in actions in rem. A cargo of oil may be discharged in such circumstances as to constitute a defence under the Acts. But the cargo-owner is not on that ground prevented from succeeding in a damage claim in maritime law. Even if the circumstances of the discharge constitute both a statutory defence and a general average act, the owner of the cargo

16. Silver v. Ocean S.S. Co. [1930] 1 K.B. 416 (C.A.), p. 435, per Greer, L.J., in his reserved judgment.

17. Hague Rules, Article IV rule 2 (n).

jettisoned should be entitled to institute an action in rem against the ship.<sup>18</sup> Again, Article IV rule 4 of the Hague Rules<sup>19</sup> exonerates the shipowner as carrier from liability for loss or damage arising from a deviation to save life or property at sea. This exception does not extend to a discharge of oil deemed necessary for the safety of the ship or life in circumstances that would constitute a defence under the Acts.

Under the State enactments, it is a condition of the defence that all reasonable steps must have been taken to stop or reduce the escape. It is questionable whether the expenses incurred in preventing or reducing the cargo loss under the circumstances would constitute general average expenditure.<sup>20</sup> The words "all reasonable steps" will include employing salvors to stop or reduce the cargo loss. Their work, when proved successful, will give rise to salvage reward secured by a maritime lien on the cargo saved.<sup>21</sup> Thus although under the State enactments a shipowner may not be found guilty, he could be held civilly liable to a cargo-owner for the loss sustained. In such a case, it is submitted that the cargo-owner who has to pay salvage is entitled to be reimbursed by bringing an action in rem against the ship.

##### 5. New Civil Liability

The State enactments have created new statutory torts which give rise to civil liability. The costs incurred in taking preventive measures and removing or reducing the pollution are recoverable. In a number of ways, the statutory torts extend beyond the scope of common law torts. Except where a defence to a charge is established, a single discharge or escape may result in a stinging penalty and also a civil liability being imposed. We shall consider the nature of the civil liability created, its enforcement, the powers exercisable in terms

18. This can be done under the Supreme Court Act 1981 (U.K.) 20 (2) (g) re-enacting the Administration of Justice Act 1956 (U.K.), (repealed), s. 1 (1) (g). Australian courts should be able to entertain the action when the new Admiralty Act (Comth.) is enacted.

19. Scheduled to Sea-Carriage of Goods Act 1924-73 (Comth.).

20. For definition, see R. Colinaux, Carver's Carriage by Sea (12th ed. 1971), op. cit., paras. 900, et. seq.; York-Antwerp Rules 1974, Rule A.

21. As to the conditions to be met, see Chapter Eight.

of the measures that may be taken and the compensation payable for pollution damage.

Prevention or Mitigation of Pollution. A statutory tort is deemed to have been committed every time an unlawful discharge of oil occurs. Under the prevention of pollution legislation, the authority concerned may in its discretion take appropriate action. It may:

- "(a) remove oil from any waters...;
- (b) disperse or destroy the oil...or any part of it;
- (c) prevent the oil discharged or any part of it from reaching or polluting any waters...;
- (d) mitigate any pollution caused by the oil discharged."

At common law, an owner of land or movables is entitled to defend or protect his property physically against any unlawful intrusion or dispossession. A good example is the privilege of abatement or the actual removal of the offending object itself.<sup>23</sup> This right is ordinarily directed against an act of private nuisance, e.g. the branches of trees from an adjoining property encroaching over the land of the person exercising the right.<sup>24</sup> It extends to acts of wilful trespass. Legal costs may be awarded in actions successfully instituted by a property owner to restrain the wrongful acts. However, there does not seem to be any authority which enables him to recover costs and expenses incurred in exercising self-help.

To implement legislative policy effectively, the right created by this statutory tort has to be wider in scope than the limited remedy at common law. Moreover, the liability imposed by the statutory tort is strict. Where any expense or other liability is incurred by the Authority concerned, it is recoverable as a debt from the owner

22. Act (Qld.) No. 33 of 1973, s. 13 (1). Except in Tasmania, a similar provision has been in operation in the other four States since 1960 or 1961: Act (N.S.W.) (No. 48 of 1960), s. 8 (1); Act (S.A.) (No. 34 of 1961), s. 7 (1); Act (Vic.) (No. 6705 of 1960), s. 8 (1); and Act (W.A.) (No. 33 of 1960), s. 7 (1).

23. Morrison, Phegan and Saphideen, Cases on Torts (5th ed. 1981), pp. 194-195.

24. Ibid., p. 195.

or master of the ship or the person in charge of the apparatus.<sup>25</sup> What appears to be harsh is that the owner or master is rendered civilly liable for the statutory torts committed by others. These include the pilot, the ship's engineer, the charterer, the salvor, the ship repairer, the mortgagee in possession and the company responsible for the ship's management. The remedy differs in essence from the quasi-contractual right of reimbursement. At common law,<sup>26</sup> a person who has incurred expenses or liability on behalf of another person may, in certain circumstances, be able to recover an amount commensurate with the benefits conferred on the latter.<sup>27</sup> Under the State enactments, the expense and liability are recoverable irrespective of whether or not any benefits are in fact conferred on the polluter. Moreover, the clean-up operations undertaken may, or may not, reduce his ultimate liability to pollution-damage victims.

It is submitted that the Authority's right is in the nature of a statutory indemnity. Its scope is considered in Maritime Services Board of New South Wales (N.S.B.) v. Posiden Navigation Incorporated (P.N.I.); Maritime Services Board of New South Wales v. Liberian Cross Transports Incorporated (L.C.T.I.).<sup>28</sup> There the question was raised as to what expenses and costs incurred were recoverable. Claims were brought against two companies under the Prevention of Oil Pollution of Navigable Waters Act 1960 (N.S.W.), as amended. In March, 1977, oil was discharged into the waters of Port Jackson from the ship "Stolt Sheaf" owned by P.N.I. In September, 1980, there was a further discharge of oil into the same waters from the oil tanker "World

25. Act (N.S.W.) (No. 48 of 1960), s. 8 (2); Act (Qld.) (No. 33 of 1973), s. 13 (2); Act (Vic.) (No. 6705 of 1960), s. 8 (1) and (2); Act (W.A.) (No. 33 of 1960), s. 7 (2) and (3); and Act (S.A.) (No. 34 of 1961), s. 7 (2) and (3). The last-mentioned Act further provides that the rights of the Board or any other person to recover damages at common law in respect of the consequence of such discharge shall not be affected: s. 7 (3). Moreover, under the Prevention of Oil Pollution of Navigable Waters Amendment Act 1973 (N.S.W.), ss. 7D (a) and (b) and 7E (3) (a) and (b) and Pollution of Waters by Oil Act 1973 (Qld.), ss. 23 (3) (a) and (b) and 24 (3) (a) and (b), the expense or liability incurred by the Board and the Minister, respectively, constitutes a debt which gives rise to a charge on the ship. The ship may be detained until payment is made or satisfactory security for the payment is provided.

26. Where a contract exists, a person may, by way of indemnity, recover the full amount expended on another's behalf irrespective of the benefit conferred.

27. This principle of reimbursement is clearly stated by R. Goff and G. Jones, The Law of Restitution (1966 ed.), pp. 221-222.

28. [1972] 1 N.S.W.L.R. 72.



Encouragement" owned by L.C.T.I. M.S.B., the plaintiff, in purported performance of its powers under sections 7 E (3) and 8 (2) of the Act (N.S.W.), as amended, caused such things to be done as it thought proper to remove and reduce the effects of the pollution. The charges disputed by P.N.I. were those for labour (\$25,895) payable to P.N.I.'s employees for their occupations and usual work, and for the plant (\$7,826). The items disputed by L.C.T.I. were labour costs (\$35,283) (comprising salaries and wages paid to permanent staff, payroll tax, workers' compensation, insurance, leave entitlements, administration charges, etc.) and plant charges (\$12,726).

In each action, the defendants argued that they were only liable for moneys M.S.B. had paid out to others whether as "expenses and liabilities" or as "costs and expenses". They denied liability in relation to wages for permanent employees who might have been diverted from other tasks to clean up the oil and for the use of the plaintiff's plant and equipments. Despite differences in the wording of section 8 ("costs and expenses incurred") and section 7 E ("expenses or other liabilities"), it was held that they should each be construed in the same way. The somewhat ambiguous expressions employed prompted Yeldham, J., to apply the mischief rule in construing the two sections. Its merit lies in the answer, which Parliament has presumably provided, to the defect and mischief for which common law has no remedy. In both situations, judgment was given for the plaintiff in respect of the claims in question. One natural reaction by shipowners and others affected to the extensive powers given to the Minister or the Authority concerned, coupled with the outcome of this case, is a feeling of grave economic injustice, distrust and frustration. The unpleasant side effects of the legislation which, if left unchecked, could erupt into an unmanageable crisis, were alleviated by Geldham, J. Clear limits were set to the scope of the statutory indemnity. In explaining the effects of the interpretation on both parties, he said:<sup>29</sup>

"That broad approach rejects the fine distinctions between cases where the M.S.B. has employed others to do the work and where it has done it with its own men and facilities. This conclusion does not mean...that the Board is entitled to make a profit from its clean-up operations or to make a 'commercial charge' for the work done. But it does mean that it is entitled to calculate the actual costs to it of using its own employees, including overheads and administrative charges, as well as the actual cost to it of using its own plant, and any necessary overheads involved in the latter."

The analysis shows the great lengths to which the statutory indemnity

29. Ibid., p. 91.

can go. Clearly the law in the present state is unsatisfactory and unconscionably harsh. This is largely due to the imposition of new statutory liabilities without regard for the effects of claims that may be pursued in another branch of the law.

For example, in respect of one spillage, a shipowner and the master may each be subject to an indemnity bill under a State Act, a pollution-damage claim and a penalty. As in the New South Wales case, the indemnity bill from the Authority may consist of the wages paid to a large staff, payroll tax and other charges. The expense and extent of the measures taken and the location where they are carried out are at the sole discretion of the Authority. Those clean-up measures may benefit the public or the district in general but may not serve to remove the damage caused to property owners and other persons.<sup>30</sup> A common law action in negligence and/or nuisance may later be instituted against the same polluters.

It is desirable to streamline this aspect of the law by bringing it within the ambit of maritime law.

Notice issued by Minister or Authority. Rather wide powers are given to the Minister or the Authority concerned to deal with an "occurring" or "likely" discharge.<sup>31</sup> The notice addressed to the shipowner may require certain action to be taken in relation to the ship, her cargo, or both. The requirements may, *inter alia*, prohibit the removal of the ship, her cargo or the discharge of oil from her.<sup>32</sup>

30. For tables which outline data on clean-up and damage costs for over 150 spills, see Combating Oil Spills (Some Economic Aspects) (1982 ed.), O.E.C.D., pp. 123-140.

31. The statutory measures provided may be seen as a valuable supplement to a court injunction. As to the right of a plaintiff to apply for an injunction to prevent an oil spillage which would ruin his business, see J. Gibson, "Oil Pollution and the Common Law" [1979] 4 L.M.C.L.Q. 498.

32. Act (N.S.W.) (No. 59 of 1973), s. 7 A (1) and (3); Act (Qld.) (No. 33 of 1973), s. 20 (1) and (3); Act (S.A.) (No. 24 of 1979), s. 7 A (1) (d) and (k), and to a lesser extent Act (Vic.) (No. 6705 of 1960), s. 8 A (1), as amended.

Undoubtedly, the wide powers given under the legislation of the four States will impinge upon the rights of third parties under maritime law. Their exercise has become a new factor to be taken into account. It will interfere with or put an end to salvage operations<sup>33</sup> or any towage work under way. In the absence of express contractual provisions, it is questionable as to what rights a salvor or the tug owner will have under Australian law.<sup>34</sup> The orders contained in the notice may render impossible the performance of all or some of the provisions in the charterparty or bill of lading contracts. They will interfere with the scheduled operations of the ship, cause delay in cargo delivery and result in serious economic loss. These occurrences have implications in maritime law.

Three different situations should be considered. In each case, the ship involved may be an oil tanker or just a cargo vessel carrying on board a quantity of oil in drums and containers.

Firstly, the "occurring" or "likely" discharge, which is discovered when the ship sails into Australian State territorial waters, could have resulted from a collision which occurred during the voyage. Bill of lading holders<sup>35</sup> and the non-demise charterer<sup>36</sup> will institute proceedings in rem against the ship. The outcome of the actions will depend on whether negligence on the part of the shipowner as the cause is established and also on the availability of any exemption clause.

Secondly, in the absence of any collision or encounter with severe weather conditions at sea the "occurring" or "likely" discharge should be viewed as a serious matter. It is immaterial that the problem

33. As to interference with the rights of a salvor in possession, see note by M.K. in (1970) J.B.L., pp. 161-162.

34. As against ship or tanker for the services rendered.

35. See Admiralty Court Act 1861 (Imp.), 24 Vic., c. 10, s. 6; Supreme Court Act 1981 (U.K.), s. 20 (2) (g) and (h). It is submitted that the shipowner is answerable for any loss or damage directly attributed to the measures taken. This is the case where the measures are taken following the collision which is due to the fault of the shipowner.

36. Supreme Court Act 1981 (U.K.), s. 20 (2) (h), re-enacting Administration of Justice Act 1956 (U.K.), s. 1 (1) (h). When the new Admiralty Act (Comth.) is enacted, Australian courts will have the jurisdiction to entertain the claim.

in itself does not cause physical damage to the goods carried or interfere with the working of the ship or her machinery. There is the likelihood that the smooth flow of maritime trade will be interrupted when a ship in such condition is involved. It is submitted that, to protect the rights and interests under maritime law, the term "unseaworthiness" should be re-defined. It should extend to non-compliance with legislation, whether in a home or foreign port, dealing with pollution. For example, a ship that is not in possession of a valid ship construction certificate or not surveyed periodically as required under Division 12 of Part IV of the Navigation Act 1912-73 (Comth.) should be regarded as unseaworthy.<sup>37</sup> The facts of the Scots case of The "Mihalis"<sup>38</sup> indicate that discharge of oil in contravention of the Zetland County Council Act 1974 (Scot.) could result in the loss of charter hire. Aerial surveillance of the waters around Shetland showed that there was oil about a mile long in the wake of The "Michalis". It was much broader than the normal wake of a ship. Neither the terminal operators nor the charterers intended to take any action to stop the ship from entering the harbour and loading the cargo. The harbour authority advised the ship's agents that they would exercise the powers under the Act (Scot.) and refuse to allow the ship to berth. It also threatened to issue a special order. The charterers cancelled the charter.

It is clear that the ship is not "operation-worthy". Maritime law should provide redress for loss or damage suffered in such circumstances.

Thirdly, the "occurring" or "likely" discharge could be due to the defective condition of the drums or containers in which the cargo is put on board by the shipper. Loss will invariably be caused to the shipowner as carrier if the ship is held up or prevented from berthing because of leakage from the cargo. It is submitted that the cargo-owner is liable to the shipowner for the loss caused. Although the

37. As amended by Navigation (Protection of the Sea) Amendment Act (Comth.) (No. 40 of 1983), s. 6. This Division applies to ships carrying or using oil.

38. [1984] 2 Lloyd's Rep. 525 (Court of Session Outer House).

cargo carried is maritime property, the courts have no statutory jurisdiction to entertain an admiralty action in rem solely against the cargo.<sup>39</sup> Moreover, the shipowner, as carrier, is not protected under the Hague Rules<sup>40</sup> or the Brussels Protocol 1968. It is necessary to include in the charterparty or bill of lading an indemnity clause. To remove the anomaly, amendments to the Hague Rules and the admiralty law are necessary.

A statutory notice is enforceable in two ways. Non-compliance constitutes an offence rendering the shipowner liable to a penalty of \$50,000. In addition, the Minister or Authority may "cause such things to be done" as seem proper to prevent or reduce the pollution of any waters, coast or reef of the State.<sup>41</sup> A deterrent aspect of the exercise is the fearsome costs of the clean-up or preventive measures chargeable to the shipowner. The nature of this statutory indemnity has been considered. In New South Wales, Queensland, South Australia and Victoria, the right to enforce this indemnity is subject to two logical exceptions.<sup>42</sup> The first applies to the need to save life at sea. Thus despite the receipt of the notice, a ship can still respond to an S.O.S. signal and undertake salvage work or take a ship on tow. It is essential that the object is to save life, even though property will also be salvaged in the process. The second exception applies where compliance with the notice is impossible. Apart from mechanical breakdown, stranding or the loss of the ship, compliance

39. Except where there is a maritime lien on the cargo, e.g. in favour of a salvor. In The Andaline (1886) 12 P.D. 1, it was held that seamen who had a maritime lien on the freight could arrest the cargo for the purpose of enforcing the lien.

40. The Hamburg Rules, however, contain a provision rendering the shipper liable to the carrier in certain situations: Part III Article 12, see United Nations Commission on International Trade Law Yearbook, vol. IX (1978), p. 214.

41. Act (N.S.W.) (No. 59 of 1973), s. 7 E (2); Act (Qld.) (No. 33 of 1973), s. 24 (2); and Act (Vic.) (No. 6705 of 1960), s. 27 (2). Under these provisions which apply to tankers, the authority to take the appropriate action is not dependent on the non-compliance with any notice.

42. Act (N.S.W.) (No. 59 of 1973), s. 7 D (4) (a) and (b); Act (Qld.) (No. 33 of 1973), s. 23 (4) (a) and (b); Act (Vic.) (No. 6705 of 1960), s. 25 (a) and (b); and Act (S.A.) (No. 24 of 1979, s. 7 d (1) (a) and (b).

may be rendered impossible by legal process. This may occur where the ship is under arrest in an admiralty action in rem commenced by the mortgagees, salvors or other claimants. If our reasoning is correct, plaintiffs should take advantage of the situation by instituting an admiralty action in rem early.

To the disadvantaged position of those adversely affected is added another difficulty. Section 29 of the Queensland Act<sup>43</sup> reads:

"No proceedings in the nature of an application for an injunction shall lie in any court in respect of an action or notice given by a prescribed authority or by the Minister or his agent purportedly under the authority of this Act."

It seems that damages in tort may be recovered by the shipowner, charterer, salvor or cargo-owner where the statutory powers are abused or exercised in bad faith. The tortious acts are probably committed on behalf of the Authority or the Minister involving the use of ships and other equipment. It is submitted that the claimants should be allowed to institute actions in rem against the ships and other equipment involved.<sup>44</sup>

#### 6. Compensation for Third Parties

Pollution damage from oil tankers. Before the Protection of the Sea (Civil Liability) Act 1981 (Comth.) came into force, New South Wales, Queensland and Victoria had enacted legislation to deal with discharge from tankers carrying oil in bulk.<sup>45</sup> The statutory tort created imposes strict civil liability on the owner and the master of the tanker for pollution damage. Apart from certain exceptions, it is noteworthy that, for the first time, third parties are given protection where their property is damaged or actually threatened by an impending damage by contamination. Thus a "person who suffers loss of or damage to any property or incurs expense or liability in preventing or mitigating such loss or damage" is entitled to recover.<sup>46</sup> Unfortunately, the remedy falls short of allowing non-property owners, e.g. fishermen, tourist operators or wage earners, to recover for loss of

43. Act (Qld.) (No. 33 of 1973).

44. Unfortunately, the law does not permit such action to be brought against government ships or property. See Chapter Nine.

45. Act (N.S.W.) (No. 59 of 1973), s. 7 E; Act (Qld.) (No. 33 of 1973), ss. 24 and 25; Act (Vic.) (No. 6075 of 1960), s. 27.

46. Act (Qld.) (No. 33 of 1973), s. 25; Act (Vic.) (No. 6705 of 1960), s. 27 (3) (i) and (iii); and Act (N.S.W.) (No. 59 of 1973), s. 8 A (1). Apparently s. 8 A (1) of the last-mentioned Act enables third parties to recover compensation for damage caused by discharge from both ships and tankers.

profits or earnings caused by an oil slick. In addition to these shortcomings, the Acts do not authorise victims of pollution damage to detain the tankers concerned until their claims are satisfied or to institute in rem proceedings against them.

However, the State provisions referred to above are largely, if not entirely, superseded by provisions of the Protection of the Sea (Civil Liability) Act 1981 (Comth.).

#### IV. COMMONWEALTH LEGISLATION AND INTERNATIONAL CONVENTIONS

Prior to the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.) being enacted, the Commonwealth Parliament adhered to the philosophy of controlling oil pollution by merely imposing penalties. Effect was given to the International Convention for the Prevention of Pollution by Oil 1954. Thus the owner and the master of a ship registered in Australia would each be guilty of an offence where a discharge occurred in breach of the Pollution of the Sea by Oil Act 1960 (Comth.).<sup>47</sup> The inefficacy and harshness of such measures have already been noted.

##### 1. Protection of the Sea (Powers of Intervention) Act 1981 (Comth)

It gives effect to the International Convention relating to Intervention on the High Seas in Cases of Pollution Casualties 1969.<sup>48</sup> By section 8 (1), the Minister has wide powers to take the necessary action on the high seas to prevent, reduce or eliminate the danger of oil pollution.

"Convention" and "non-convention measures". The measures that may be taken under the Act (Comth.) in relation to the ship or ships involved in a maritime casualty may impinge upon maritime law in a number of ways.

The "convention" measures include the following:

47. This Act together with the 1965 and 1972 amending Acts (Comth.) was repealed by the Protection of the Sea (Discharge of Oil from ships) Act (Comth.) (No. 32 of 1981), s. 3.

48. And also to the 1973 Protocol. See s. 9, s. 10 and Schedule II.

- (1) moving the ship or part of the ship to another place;
- (2) removal of cargo from the ship;
- (3) salvage of the ship, part of the ship or any of the ship's cargo;
- (4) sinking or destruction of the ship or part of the ship;
- (5) sinking, destruction or discharge into the sea any of the ship's cargo;
- (6) taking over control of the ship or part of the ship;<sup>49</sup> or
- (7) the issue of directions under section 11 to the shipowner, the master or the salvor in possession of the ship.

It is vital to consider how far maritime rights or interests may be infringed by the measures which may be taken. The sinking or destruction of the ship will put an end to the maritime liens<sup>50</sup> which have attached thereto and to the security in favour of the ship mortgagees. A salvor may lose his reward in respect of the salvage or towage services<sup>51</sup> rendered before the "convention" measures were taken. The category of persons adversely affected include maritime lienholders, e.g. the unpaid crew members, etc. the necessaries men, the ship mortgagees, the bill of lading holders and the shipowners. What is remarkable is that the ministerial directions may require the shipowners, the master or the salvor in possession of the ship to carry out some of the wide-ranging measures listed above. It is questionable whether these persons could escape liability for the damage or loss caused as a result of complying with the ministerial directions.<sup>52</sup> There is no provision in the Act (Comth.) or the Convention which protects them from liability.<sup>53</sup> It is doubtful whether the shipowners and the master, if found liable, will be able to limit their liability.

There are several ways in which the Minister and others acting under his authority may be held answerable for tortious interference

49. S. 8 (2).

50. See Chapter Eight.

51. E.g. under the Lloyd's Standard Form, where the services are rendered on the basis of "No Cure, No Pay", a salvor will get nothing if no property is saved.

52. As to liability for damage beyond what is reasonably necessary, see the 1969 Convention, Articles V, VI and VII.

53. It is submitted that an amendment should be made which gives full immunity to the shipowner, the master, the salvor and the ship involved.



with the rights, or wrongful damage to the property, of third parties.

The case of Padfield v. Minister of Agriculture, Fisheries and Food<sup>54</sup> underlines the readiness of the House of Lords to apply the doctrine of extended ultra vires to a Minister of the Crown entrusted by statute with a broad, subjective discretionary power. The doctrine is undoubtedly part of the administrative law of Australia.<sup>55</sup> Lord Upjohn lucidly explained that, even though the adjective "unfettered" was actually used in a provision conferring the power of discretion on the Minister, it can do nothing to unfetter the control which the judiciary have over the executive. He continued in these terms:

"...in exercising their powers the [executive] must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."<sup>56</sup>

The measures taken or directions issued by the Minister may be held to be unlawful on grounds of simple or extended ultra vires. Claimants, whose interests or property is injured in such circumstances, are entitled to recover damages which are not subject to limitation of liability. Moreover, the Convention expressly prohibits unnecessary interference with the rights and interests of the "flag State, third States and of any person, physical or corporate concerned".<sup>57</sup> It does not prejudice any right or "deprive any of the Parties or any interested physical or corporate person of any remedy otherwise applicable."<sup>58</sup> In carrying out the unlawful action, a ship could have been used as an instrument of interference, damage or destruction. There is no reason why proceedings in rem should not be allowed to be brought against the ship. But, on statutory grounds, this course

54. [1968] A.C. 997. Basically, the question at issue concerned the nature and extent of a Minister's statutory duty in deciding whether to refer to a committee a complaint made by those persons adversely affected by the scheme.

55. It is applicable on a number of grounds, including abuse and failure to exercise discretionary power: S.D. Hotop, Cases and Materials on Review of Administrative Action (1979 ed.), pp. 280-356; H. Whitmore and M. Aronson, Review of Administrative Action (1978), pp. 199-242.

56. [1968] A.C. 997, p. 1059.

57. Article V para. 2.

58. Article VII.

of action may not always be open to the claimants.<sup>59</sup>

Moreover, at common law, negligence in the exercise of statutory functions can give rise to liability. Maritime interests and rights are entitled to similar protection. In Caledonian Collieries Ltd. v. Spiers,<sup>60</sup> Dixon, C.J., and McTiernan, Kitto and Taylor, J J., referred to the application of the well-settled principle. They said:<sup>61</sup>

"...when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered."

It is submitted that those, who are damnified as a result of the negligence of the Minister or his agents in taking the "convention" measures or issuing the directions, are entitled to damages.

An "excess damage" remedy is provided by the Convention. Compensation is payable to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the goals stated in Article I.<sup>62</sup> It is a strict requirement of the Convention that the measures taken must be proportionate to the harm actually inflicted or threatened by the pollution. There is no doubt that the onus of proving non-observance of this requirement lies on the maritime claimants.<sup>63</sup>

It has been noted that the statutory powers of intervention, when exercised, will generally result in injury to maritime interests and property. In actions for compensation, the plaintiffs will be those whose claims are recognised in maritime law. Included among them are

59. As to in rem proceedings against Crown ships and cargo, see Navigation Act 1912-73 (Comth.), s. 405 A, infra.

60. (1957) 97 C.L.R. 202.

61. Ibid., p. 220. The decision in Birch v. Central West C.D.C. (1969) 119 C.L.R. 652 is another example. An action for negligence was held to lie against a statutory authority for damage negligently caused in the course of exercising functions conferred on it for the benefit of the public. For English authorities where the principle is applied, see Dutton v. Bognor Regis United Building Co. Ltd. and Another [1972] 1 All E.R. 462; David Geddis v. Proprietors of the Bann Reservoir (1878) 3 App. Cas. 430.

62. See Article VI.

63. For specific guidelines, see Article V para. 3.

the assignees of ship mortgages, freight and crew's wages and also the insurers who sue as subrogees. It is true that where the multi-party actions succeed, the Commonwealth as a Party to the Convention will have the resources to satisfy the judgments. But the total amount payable as compensation will usually be limited to the value of the res and cargo wrongfully destroyed. A difficulty is envisaged where the amount is insufficient to meet in full the claims of the maritime lienholders, the mortgagees and the other creditors. The amount recoverable represents the value of res and the cargo destroyed. It is submitted that the competing claims should be paid according to the order of priority that would have applied<sup>64</sup> if no sinking or destruction had taken place.

In two important ways, the "non-convention" measures and directions authorised in section 10 differ from those considered above. Subject to certain exceptions,<sup>65</sup> the section applies in relation to any ship in internal waters or in the Australian coastal sea<sup>66</sup> and any Australian ship on the high seas. The statutory powers are exercisable where oil is escaping or has escaped from a ship or the Minister is satisfied that oil is likely to escape from such a ship. As regards Australian ships on the high seas, measures may be taken or directions issued either under the Convention or under section 10, or possibly under both. The non-convention powers under section 10 are easier to exercise and, in a number of ways, give the administering Authority wider leeway than the "convention" powers. This fact will render it more difficult for maritime interests and property owners who are damaged by unlawful intervention or negligent acts to succeed in their claims.

Recovery of expenses. The expense or liability incurred in taking the measures under sections 8 and 10<sup>67</sup> constitutes a debt. It is

64. The matter is discussed in Chapter Seven.

65. They are trading ships proceeding on an intra-State voyage, fishing vessels proceeding on a non-overseas voyage and pleasure craft: s. 10 (6).

66. Defined in s. 10 (8). See also the meaning of "Australian waters" in Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 22 (4).

67. Protection of the Sea (Powers of Intervention) Act 1981 (Comth.).

due to the Commonwealth by the shipowner or, where two or more ships are involved, by the owners of those ships jointly and severally.<sup>68</sup> This right of recovery is subject to a number of important exceptions.<sup>69</sup> The shipowner or shipowners are exonerated where it is proved that the incident -

- "(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;
- (b) was caused by an act or omission done by a third party with intent to cause damage; or
- (c) was wholly caused by the negligence or other wrongful act of any government, or other authority, responsible for the maintenance of lights<sup>70</sup> or other navigable aids in the exercise of its functions in relation to those lights or aids."

The first part of paragraph (a) runs on traditional lines and includes a number of the Hague Rules exceptions in Article IV rule 2. These are "(e) Act of war", "(f) Act of public enemies" and "(k) Riots and civil commotions".<sup>71</sup> Though similar to an act of God,<sup>72</sup> the exception "natural phenomenon...irresistible character" is different from it in other respects. A later criterion adopted in Greenock Corporation v. Caledonian Ry.<sup>73</sup> is whether or not human foresight and prudence could reasonably recognise the possibility of such an event. The learned authors of Winfield and Jolowicz on Tort have correctly stated that

68. Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 20 (1).

69. In the absence of actual fault or privity on the shipowner's part, the amount recoverable under s. 20 (1) is limited; see s. 20 (3) and Protection of the Sea (Civil Liability) Regulations (Comth.) (Statutory Rules No. 222 of 1983), reg. 11. See also Chapter Eight.

70. See Lighthouses Act (Comth.) 1911; Merchant Shipping Act 1894 (Imp.), Part XI.

71. The meaning and scope of these exceptions are well explained in R. Colinvaux, Carver's Carriage by Sea (12th ed. 1971), pp. 248-249.

72. Hague Rules, Article IV rule 2 (d).

73. [1917] A.C. 556. The House of Lords criticised the defence in Nichols v. Marsland (1875) L.R. 10 Ex. 255, in which doubts were raised as to the finding of facts by the jury.

"the essence of an act of God is not so much a phenomenon...sometimes attributed to a positive intervention of the forces of nature, but a process of nature not due to the act of man...."<sup>74</sup> It therefore differs from the statutory exception which, inter alia, must be "of irresistible character". The element of inevitability or irresistibility implies that the occurrence must be of such an exceptional nature that it is totally impossible to avoid or overcome.

For the exception in paragraph (b) to apply, two conditions must be satisfied. The person wholly responsible is "a third party" and the act or omission is done "with intent to cause damage". It appears that the object is to protect shipowners who, in shipping operations, have to rely on the services of a variety of persons, e.g. engineers, ship repairers, refuellers and stevedores. They may have been engaged as employees, agents or independent contractors. It is submitted that for the purpose of the meaning of paragraph (b) each of these persons is regarded "a third party" when acting in breach of his authority, viz. in committing an act or omission with a criminal intent. An example may be drawn from the English Court of Appeal decision in the Chyebassa case.<sup>75</sup> The principle, when applied, will result in the loss of a person's status as an agent or servant when perpetrating a criminal act. Their goods were shipped under bills of lading which incorporated the Hague Rules. They were delivered damaged by sea-water. This occurred as a result of the theft of the storm valve cover plate by the shipowners' stevedores during the loading and unloading of other cargo at Sudan. The English Court of Appeal allowed the shipowners' appeal against the trial court judgment for the cargo claimants. In holding that a thief would not come within the meaning of "servant" or "agent" in Article IV rule 2 (g), Sellers, L.J., said:<sup>76</sup>

"The thief was not in fact the servant of the appellants and could only be regarded as one - or more correctly as an agent of the shipowners - in so far as he was performing a task for and on their behalf. In dealing with the ship's structure the thief was not acting or purporting to act for the shipowners and ought not in such circumstances be held to be their agent.

74. W.V.H. Rogers, Winfield and Jolowicz (11th ed. 1979), op. cit., p. 417.

75. Leesh River Tea Company Ltd. and Others v. British India S.N. Co. Ltd. [1966] 2 Lloyd's Rep. 195.

76. Ibid., p. 200.

It is interesting to note that a similar approach is adopted in the Carriage of Goods by Sea Act 1971 (U.K.) which has incorporated the Brussels Protocol 1968.<sup>77</sup> In certain situations, a servant or agent of the carrier is not entitled to rely on the defences and limits of liability under the Rules scheduled to the Act (U.K.). They occur where it is proved that the damaged resulted from "an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."<sup>78</sup> It is submitted that the person, who commits such an act or omission, will forfeit his status as a servant or agent and be relegated to the position of a third party.

One undesirable consequence is the increased tendency of ship-owners to invoke the exception by unjustly putting the blame on their employees and agents.

The "negligence or other wrongful act of any government" in paragraph (c) would embrace any unlawful measures as well as negligence committed in taking those measures. It should cover a case where the expenses are incurred as a result of a spillage from a vessel damaged in a collision due entirely to the fault of a ship owned by the Australian Government or a foreign government. What is harsh is that this exception is unavailable to a shipowner where he is personally or vicariously guilty of contributory negligence.

Next comes the method of recovering the expenses incurred in taking the measures. Payment of the expenses due by the shipowner or shipowners as a debt to the Commonwealth is enforceable in two ways. Firstly, the amount payable is secured by "a charge" imposed on the ship or ships involved.<sup>79</sup> The charge is nowhere defined in the Act (Comth.) and cannot be presumed to be a maritime lien. The provisions creating the charge do not authorise the Commonwealth as chargee to dispose of the res. It is clear that under the Colonial Courts of Admiralty Act 1890 (Imp.)<sup>80</sup> no action in rem can be instituted

77. Still not given statutory effect as municipal law in many of the British Commonwealth countries.

78. Article IV Bis, rule 4.

79. Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 22 (1).

80. 53 & 54 Vic., c. 27; see also the Admiralty Court Act 1861 (Imp.), 24 Vic., c. 10, infra. See, however, Draft Admiralty Bill 1985, clause 37 (1) and (5).

to enforce the charge.<sup>81</sup> Secondly, the ship or ships in question may be detained by a person authorised by the Minister until the amount due is paid or satisfactory security for the payment has been furnished. It is submitted that the charge coupled with the power of detention is in the nature of a quasi-maritime claim. It appears that the ship's other creditors, e.g. mortgagees and maritime lienholders, may be adversely affected. When the ship, which is subject to the charge and under detention, is sold, the issue will arise as to the order in which the various claims are to be paid.

## 2. Protection of the Sea (Civil Liability) Act 1981 (Comth.).

We have seen how the gaps left by common law have, to a limited extent, been filled by legislation in three States.

A number of problems, however, still remain. State Parliaments have no jurisdiction over ships proceeding on inter-State or overseas voyages. State legislation provides no redress for damage caused by pollution in Australian waters<sup>82</sup> and on the high seas. The crippling statutory penalties often leave shipowners with little or no assets to meet their civil liability. This includes property damage or loss caused to third parties and the exorbitant clean-up costs. Apart from the burden of proving negligence and other elements to be met by claimants in order to succeed, there is the anomaly that at common law purely financial loss is usually not recoverable.<sup>83</sup>

It was to deal with these difficulties that the Commonwealth Parliament gave statutory effect to the International Convention on Civil Liability for Oil Pollution Damage, 1969, and the Protocol. The provision of a resource fund or other financial security to meet pollution-damage claims and the costs of preventive measures is a tribute to the ingenuity of the Convention formulators.

We shall evaluate the effects of this Convention on maritime law.

Firstly, it imposes strict liability for oil-pollution damage on

81. The meaning of "charge" is considered in Chapter Nine.

82. 1981 Act (Comth.), s. 22 (4); 1969 Convention, Article II.

83. Supra, except of course, in an action for public nuisance, where special or particular damage is proved.

the shipowner personally. At the time when the spillage occurs, the ship may be under a demise charter or in the possession of a mortgagee or salvor. The word "owner" is narrowly defined to mean, inter alia, a registered owner and, where the ship is State-owned, the company registered as the ship's operator.<sup>84</sup> In the absence of an agreement, the shipowner is not entitled at common law to be reimbursed in respect of the strict civil liability for any pollution damage caused. This seems to be the situation where the spillage has occurred without any negligence or default in the operation, management or navigation of the ship while she is in the possession of a demise charterer, salvor or mortgagee.

Paragraph 5 of Article III of the Convention does not "prejudice any right of recourse of the owner against third parties." It is uncertain whether, under this provision, a demise charterer and other persons in possession will, even in the absence of negligence or default, be subject to the "convention" liability. Moreover, the shipowner's personal action or right of recourse, if maintainable, against a demise charterer, mortgagee or salvor may yield only partial or, in some cases, no satisfaction. It is submitted that under the Colonial Courts of Admiralty Act 1890 (Imp.) the shipowner is unable to bring an action in rem against a ship belonging to the demise charterer, salvor or mortgagee.<sup>85</sup>

Secondly, under the Convention compensation is only payable for pollution damage, including the costs of preventive measures and further loss or damage caused by such measures. The expression "pollution damage" is defined as loss or damage caused outside the oil-carrying ship by contamination resulting from the spillage of oil from the ship.<sup>86</sup> This narrow definition has created a serious gap in the law.

84. Article 1, para. 3.

85. Australian courts have no jurisdiction to entertain any action in rem where the claim is brought for reimbursement or indemnity or to enforce the "convention" right of recourse. The shipowner is, however, personally answerable for the expense or other liability as provided under the Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 20, and is liable to compensate third parties for pollution damage caused.

86. 1969 Convention, Article 1 para. 6.



Suppose that an oil spill occurs from a ship, and large carpets of oil are being carried on top of the waves towards a holiday resort and fishing town. If, before any pollution damage is caused, the oil catches fire which spreads rapidly and causes damage to the interests and property of third parties, it is questionable whether any claim can be brought under the Convention. It is arguable that loss or damage by fire is not pollution damage caused by contamination.<sup>87</sup> On the other hand, if an outbreak of fire occurs following a spillage as a result of wrongful damage by a ship, third parties whose properties are destroyed should be able to institute proceedings in rem against the ship concerned.

Thirdly, the Convention supplements the protection provided by maritime law. The pollution damage may have resulted from the negligence of the salvors<sup>88</sup> or from a collision due to the fault of another ship. Under the Convention, the plaintiffs can claim compensation from the owner of the ship from which the pollution occurs. But they are disentitled from taking admiralty action in rem against the ship.<sup>89</sup> The Convention, however, does not prevent the plaintiffs and the shipowner from instituting proceedings in rem against the other wrongdoing ship or the salvage ship as an instrument of mischief. Since the liability of the shipowner is limited under the Convention,<sup>90</sup> it is submitted that by bringing a further action against the other wrongdoing ship or salvage vessel, the plaintiffs have a better chance of recovering compensation in full.<sup>91</sup>

87. Devastation by fire did occur in The Wagon Mound [1961] A.C. 388 and Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners and the Commonwealth of Australia (1950-1951) 83 C.L.R. 353, supra.

88. The Jade (The Eschersheim) [1976] 1 All E.R. 441 (C.A.), supra.

89. Particularly where a fund has been instituted in accordance with Article VI para. 1.

90. Article V paras. 1 and 2.

91. It is suggested that victims of pollution damage could recover from the polluter under the Convention and, as to the balance, from the other wrongdoing ship. Since no discharge occurs from the latter, the admiralty action in rem against her falls outside the Convention; see Article IV.

Fourthly, in several ways certain rights and interests protected by maritime law are adversely affected by the Convention. Paragraph 8 of Article V reads:

"Claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent or minimise pollution damage shall rank equally with other claims against the fund."

When applied to salvage law, the provision has vital implications. A salvor engaged by the shipowner may have succeeded in saving an oil-carrying ship together with the cargo. He is entitled to be paid out of the resource fund or other financial security provided. But since his services are rendered under the Convention and not under maritime law, it is doubtful that his claim will be protected by a maritime lien.<sup>92</sup> In one sense, the Convention has altered the meaning in which the word "salvage" is used. Where pollution damage is prevented or minimised through the destruction or sinking of the tanker or her cargo, the salvor is nevertheless entitled to remuneration.<sup>93</sup> It would appear that under the Convention the only salvorial services that can be rendered are contractual in nature. The Convention lays down its own criteria for remunerating the services rendered.

What is not clear concerns the position of a volunteer salvor who succeeds in salvaging the ship and the cargo of oil while she is under a demise charter. It is submitted that his rights under maritime law have not been superseded by the Convention. The salvage award should in the first place be computed, *inter alia*, according to the value of the *res* and the cargo salvaged without reference to the pollution damage averted. Moreover, since by saving the ship and her cargo he has also prevented pollution damage, it is arguable that remuneration should also be paid as expenses under paragraph 8 of Article

92. Article VI para. 1, when complied with, has the effect of extinguishing a salvor's rights under maritime law. A salvor acting under directions may lose his right to salvage award on the ground that his work is not voluntary: D.W. Abecassis, "Some Topical Considerations in the Event of a Casualty to an Oil Tanker" [1979] 4 L.M.C.L.Q. 449, p. 455.

93. Such expenses when reasonably incurred are claimable under Article V para. 8.

V. However, paragraph I of Article VI seems to operate to his disadvantage. Where the shipowner has complied with the provisions, a person having a pollution-damage claim is disentitled from exercising any right against other assets of the shipowners. It is suggested that the expenses incurred by the shipowner under paragraph 8 of Article V for reducing or preventing pollution damage are different from pollution-damage claims.<sup>94</sup> Even if courts reach a different decision on this issue, his salvage claim in respect of the cargo saved should be allowed especially where it is not owned by the shipowner.<sup>95</sup>

There is another way in which the maritime rights and interests of third parties in relation to the ship and the cargo may be prejudiced. Subject to the conditions in paragraphs 1 and 2 of Article VI being met, claims for sacrifices made are treated equally "with other claims" against the resource fund. Paragraph 8 of Article V seems to suggest that a shipowner may voluntarily sink or destroy his ship together with the cargo to prevent or reduce pollution damage. If the interpretation is correct, the resource fund established by the shipowner may be reduced in his favour in proportion to the value of the claims on behalf of the ship and the cargo sacrificed.<sup>96</sup> Unfortunately, there is nothing in the Convention which provides that the amounts so reduced will be held by the shipowner for the benefit of the maritime lienholders, ship mortgagees and other claimants. In this respect, the Convention treats with partiality victims of pollution damage at the expense of financiers, merchants and traders who have acquired rights and interests under maritime law.

### 3. Levy on Ships<sup>97</sup>

The increasing expense of maintaining the stockpile of materials and equipments and providing sufficient personnel to combat pollution necessitated the setting up of a fund by Commonwealth legislation.

94. This reasoning is not weakened by the equal ranking of the claims.

95. In such circumstances, Article VI has no application.

96. Article V para. 4.

97. Levy was first initiated by the Pollution of the Sea by Oil (Shipping Levy) Act (Comth.) (No. 132 of 1972) and the Pollution of the Sea by Oil (Shipping Levy Collection) Act (Comth.) (No. 133 of 1972). For the purpose of streamlining legislation titles on the subject, they were repealed and replaced by two Acts bearing the words "Protection of the Sea" as part of their citation.

As section 55 of the Commonwealth of Australia Constitution Act 1900 (Imp.) prohibits an Act imposing taxation from also dealing with the collection of levy, two "non-convention" Acts were passed. Subject to certain exceptions, the Protection of the Sea (Shipping Levy) Act 1981 (Comth.),<sup>98</sup> applies to all ships (including those laid up) whose tonnage exceeds 100 tons, with at least ten tonnes of oil in bulk on board while such ships are in any Australian port. Legislators consider that pollution threat posed by smaller ships and ships with less than ten tonnes of oil on board to be insufficiently serious. The levy, imposed at quarterly intervals, was raised from one cent per ton of the ship's tonnage in 1972 to four cents. It is subject to the minimum of twenty-five dollars payable per ship. Section 4 establishes the nexus between this Act and the Protection of the Sea (Shipping Levy Collection) Act (Comth.)<sup>99</sup> for the purpose of implementing the levy. The Commonwealth Parliament has adopted the curious presumption that the levy for a quarter is payable generally by all ships in Australian ports. The presumption is rebuttable by proof that during the quarter when the ship was in an Australian port she did not have on board ten tonnes of oil or more in bulk or she was there only for one of the purposes specified in section 5.

The shipowner and the master are under a joint and several obligation to pay the levy.<sup>1</sup> Non-payment constitutes a tort which has serious consequences. The Collector may in a personal action recover from them the levy as a debt due to the Commonwealth. Besides, he may enter upon the ship and distrain goods or equipment belonging to the ship, and detain them until the levy is paid.<sup>2</sup> Such rights seem to constitute an extension of the common law remedy of distress. At common law, a distrainer is only entitled to keep the chattel for the purpose of coercing payment.<sup>3</sup> If he sells or deals

98. Act (No. 34), ss. 4 and 8.

99. Act (No. 35 of 1981).

1. Ibid., s. 9.

2. Ibid., s. 11 (1).

3. Clerk & Lindsell on Torts (14th ed. 1975), paras. 1250-1251.

with it in any unauthorised way, it becomes an abuse of the distress and a trespass.<sup>4</sup> It appears that where an intending distrainor is impeded and prevented from making a distress, he has a right of action for the damage caused.<sup>5</sup> The Act (Comth.) does not appear to confer on the Collector the right to distrain and detain goods carried on board the ship where they belong to third parties. However, following the trend set by other statutes, section 11 (2) empowers the Collector to sell the goods or equipment lawfully distrained if the levy remains unpaid for three days after the distress. The proceeds of sale will be used to pay the levy and all reasonable expenses incurred, and the surplus, if any, will be handed over to the owner or master of the ship. Where there is default in paying the levy, the ship involved may also be detained until payment has been made.<sup>6</sup> In so far as the rights are exercisable by the Collector in relation to the ship and the cargo, they are in the nature of a quasi-maritime claim. It is desirable to amend the law so as to enable the Collector to enforce the levy by way of an action in rem against the ship or possibly a sister or surrogate ship.

#### V. ESTABLISHMENT OF AN INTERNATIONAL FUND

It is clear that the compensation payable under the International Convention on Liability for Oil Pollution Damage, 1969, is inadequate. Another glaring shortcoming of the regime is that oil importers are favoured at the expense of shipowners and the victims of oil pollution damage. To deal with such anomalies and to ensure that shipowners are given relief as regards the financial burdens imposed, another International Convention was formulated and adopted to supplement the preceding one.<sup>7</sup>

In terms of its international status, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 had entered into force on 16th October, 1978. As an "insurance" convention, it would raise the amount of compensation available for oil-pollution damage to approximately \$A 51.8

4 In some circumstances, it may amount to an abandonment of the distress; Smith v. Wright (1861) 6 H. & N. 821.

5. Clerk & Lindsell on Torts, op. cit., para. 1272.

6. Protection of the Sea (Shipping Levy Collection) Act 1981 (Comth.), s. 12 (1). By s. 12 (3), the levy payable includes the amount payable under s. 8 as levy in respect of the ship. See also Draft Admiralty Bill 1985, Clause 37 (5).

7. See A.H.E. Popp, "Liability and Compensation for Pollution Damage caused by ships revisited - Report on an important International Conference" [1985] 1 L.M.C.L.Q. 118.

million.<sup>8</sup> Whether Australia will become a signatory to this Convention with the view to its implementation as law depends largely on the extent of risk she is prepared to assume.

In two respects, the 1971 Convention will have a bearing on maritime law. Firstly, the obligations of the Fund<sup>9</sup> towards the shipowner or his guarantor will depend on the former's observance of the provisions of the maritime conventions or regulations listed in paragraph 3 of Article V and the amendments. The Fund may be wholly or partially exonerated if it is proved that, as a result of the shipowner's actual fault or privity, the ship concerned did not comply with certain requirements, e.g. the International Convention on Load Lines, 1966.<sup>10</sup> In addition, the incident or damage must have been caused wholly or partially by the non-compliance. The Convention is confined to ships actually carrying oil in bulk.<sup>11</sup> When implemented as law, it may ensure that the seaworthiness of tankers is maintained and crew members are properly and sufficiently trained to cope with emergencies. The availability of supplementary benefits to shipowners, who comply with the seaworthiness requirements and collision regulations, is sound in policy and practice. It will operate to reduce the incidents involving the loss of valuable maritime interests and rights.

Secondly, paragraph 2 of Article 9 expressly reserves to the Fund the right of recourse or subrogation against unspecified persons. The right is stated to be not "less favourable than that of an insurer

8. According to information provided by Commonwealth Department of Transport, Canberra.

9. To be established as a legal person: Article II para. 2.

10. The International Convention for the Safety of Life at Sea 1960 is included. This Convention has been replaced by the 1974 Convention of the same title. See Navigation Act 1912-73 (Comth.), s. 187A and Navigation Amendment Act 1979 (Comth.), s. 93 and Schedule III.

11. The word "ship" in Article I para. 2 is given the same meaning as in the International Convention on Civil Liability for Oil Pollution Damage, 1969, Article I para. 1.

of the person to whom compensation or indemnity has been paid." A fairly wide scope is given to this right. Its effective enforcement is only possible in many cases if proceedings in rem can be brought against the wrongdoing ship or the salving tug at fault. However, the amount may not be recovered in full. The owner of the ship or salving tug may be able to limit his liability,<sup>12</sup> and there may be other competing claims with a higher order of priority.<sup>13</sup>

## V. CONCLUSION

The legislation, particularly Commonwealth, shows a strong bias towards victims of pollution damage at the expense of vital interests and rights recognised under maritime law. Steps should be taken to ensure a balanced development and administration of the laws relating to pollution-damage claims and claims under maritime law. It is suggested that the anti-pollution legislation should be treated as an outgrowth of maritime law.

In a number of instances, the new remedies based on international conventions are either not applicable or inadequate. The gaps in the law may be filled by Commonwealth legislation. The foreseeability test should be amended to enable claimants to recover compensation for pollution damage, reasonable costs of preventive measures taken and clean-up costs, if reasonably incurred. It should be possible for claims for purely financial loss, whether based on particular damage in public nuisance or on the tort of negligence, to be instituted against the ship. These amendments, when made, will provide answers to many of the current problems.

It is felt that the personal penalties imposed for ship-sourced pollution are grossly biased against the shipowner and several other persons. No account is taken of situations where the spillage occurs while the ship is in the possession and control of third parties, e.g. the salvor, the mortgagee and the demise charterer. It is desirable to amend the law to enable penalties and pollution-damage claims under the State enactments to be brought against the ship and the cargo of oil from which the discharge comes.

12. See Chapter Eight.

13. This aspect is covered in Chapter Seven.

We have seen that under Commonwealth legislation expenses incurred in taking preventive measures and the levy due will, in each case, give rise to a charge on the ship. On grounds of consistency, it is submitted that the charge and the pollution-damage claims should similarly be enforceable by proceedings in rem against the ship and the cargo of oil. Naturally, where a "convention" fund or other financial security is provided and the proceedings have been brought only for pollution damage,<sup>14</sup> the release of the ship or other property belonging to the shipowner will be ordered.

One aspect of the law is in urgent need of form. We have noted that the wide-ranging measures a Minister is empowered to take under the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.). They include issuing directions to the shipowner, the master and the salvor in possession of the ship.<sup>15</sup> It is submitted that these persons and their ships involved should be fully exonerated from liability where, in complying with the directions, loss or damage is caused to third parties.

14. Article VI para. I.

15. Ss. 9 (2) (b), 10 (3) (b) and 11.



## CHAPTER SIX

### CLAIMS AGAINST SHIPOWNERS

#### I. THE PERSPECTIVE

This chapter analyses the historical and juridical developments of three categories of claims, which concern injuries sustained by seamen, cargo loss or damage and necessities and services provided to ships. The task involves an evaluation of the remedies open to claimants.

#### II. INJURIES TO SEAMEN

##### 1. The Old Law

For many decades, the hardships suffered by seamen in the course of their employment went unmitigated. They were largely due to two causes, namely, the defective condition of the ships used and the indifference of the courts and the legislatures. The legal history is traced from the early authorities.

As late as 1853, little attention was given to the well-being and safety of seamen. In the historic case of Couch v. Steel<sup>1</sup>, the question as to the duty of care of a shipowner towards seamen was raised for the first time. The plaintiff served as a common seaman on board the defendant's (a British) vessel. As the vessel was leaky and unseaworthy, the plaintiff became wet and fell ill. The decision was a shocking experience for seamen. In the action, all three judges of the Queen's Bench gave judgment for the defendant shipowner. They held that from the shipowner-seaman relationship the law did not imply any warranty of seaworthiness. To succeed in an action for damages, a seaman had to prove that the contract of employment expressly provided that the ship was seaworthy. Alternatively, he had to prove that the shipowner was fraudulent in that he knew the unseaworthy condition of the ship and failed to disclose it at the time when the employment contract was made.

The early rule that seaworthiness would not be implied in an ordinary employment contract was extended to the gear and equipment

1. (1854) 3 El. & Bl. 402, one of the earliest English authorities on the subject.

used on board. In Rogers v. Loutit,<sup>2</sup> the plaintiff was a seaman on board a vessel of which the defendant was master and part-owner. When the seaman was unfurling a sail, the foot-rope of the cross-jack-yard, being defective, broke. He fell to the deck and sustained serious injuries. The action against the defendant failed on three grounds.

Firstly, the scope of the rule in Couch v. Steel was not defined. It was capable of being applied to exonerate shipowners from liability for many forms of injury sustained by seamen in the course of their employment. No attempt was made to distinguish one form of unseaworthiness from another. In essence, the rule meant substantial immunity for shipowners as the term "unseaworthiness" connotes a wide category of major defects in the ship. It operated to the serious disadvantage of seamen.

Secondly, the burden of proof imposed on the plaintiff was unduly harsh. He had to satisfy the court that the defendant was aware that the rope was defective or that his attention had been drawn to that fact. It had the twofold effect of negating a shipowner's duty of care towards his employees and transferring to his employees his personal obligation to provide a seaworthy ship and maintain her in good condition. As seamen in practice had little to do with the purchase of ship's stores, repairs and the overall equipment, one seriously questions the rationality of requiring seamen to discharge this burden.

Thirdly, to the already disadvantageous situation, in which injured seamen were placed, was added another difficulty. Boucatt, J., said:<sup>3</sup>

"If the men had found any rope to be in a condition dangerous to life, it was their duty to tell the captain plainly of the fact and that they would not go upon it, and they would have been justified in not doing so."

Boucatt J.'s statement, if treated as a general rule, would render the hazards of the seafaring industry unbearable. It implied that a seaman had voluntarily agreed to run the risk of serious injuries or even

2. (1881) S.A.L.R. 4. Boucatt, J., of the Supreme Court (S.A.) followed the decision in Couch v. Steele.

3. Ibid., p. 5.

death for not discovering beforehand and reporting to the master any defect in the equipment, and refusing to use it. A seaman, on the other hand, could incur penalties and forfeiture of his wages for insubordination through his refusal to obey instructions.

The legal handicaps of injured seamen worsened. Towards the end of the nineteenth century, the courts came close to holding that seamen had agreed to run the risks of injuries inherent in their calling.<sup>4</sup> In terms of the condition of work premises on board the ship and the duty of care exercisable by the shipowner, seamen were in no better position than outsiders. In McLachlan v. Service,<sup>5</sup> the plaintiff, who was employed in loading a vessel after dark, fell down an open and unlighted hatchway, and sustained severe injuries. It was held that the circumstances which might enable a stranger or visitor to recover damages for injury sustained on board did not entitle a workman on board to recover against the shipowner.<sup>6</sup> With reference to the class of workers, Barry, A.C.J., said:<sup>7</sup>

"...it consists of persons whose employment is of such nature that danger may be considered as included in the contract of service, and expressly bargained for. A greater degree of caution is required on their part, because a less degree of precaution or protection against injury is enjoined on the part of the employer."

The conclusion to be drawn from the foregoing analysis is that seamen and other workers who suffered injuries or died while working on board a ship could not, as a general rule, recover any damages. It is probable that the bleak prospect of seamen and the seafaring industry was in part due to exploitation by shipowners and the indifference to the early legislators. There were fears that liability to pay damages would encourage self-inflicted injuries and death, thus imposing financial burdens on shipowners. The unenlightened decisions, with all their harshness and injustices, are nevertheless seen as an inseparable part of the development of modern maritime law.

4. It seems that the Common Law Courts came dangerously close to saying that shipowners, when sued, could rely on the maxim volenti non fit injuria.

5. (1871) 2 V.L.R. 198.

6. Reliance was placed on the principles laid down in the well-known case of Indemaure v. Dames, L.R.1.C.P. 274 and L.R.2. C.P. 311.

7. (1871) 2 V.L.R. 198, pp. 199-200.

## 2. Interaction of Common Law

The similarity between working conditions on board a ship and those in a factory or mine led the Common Law Courts to adopt and apply identical principles. In Bartonshill Coal Co. v. Reid,<sup>8</sup> a workman was killed through the overturning of a cage. The accident was caused when the engineman failed to stop the ascending cage at the platform. The cage was allowed to be sent with great force up against the scaffolding. Lord Cranworth expressed the employer's responsibility in the following terms:<sup>9</sup>

"When a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks."

The extent of an employer's responsibility as laid down at common law was directly applied in Searle v. Lindsay and Another.<sup>10</sup> It concerned an action against shipowners for an injury caused to the plaintiff, an engineer on board their vessel, by a defective tackle. Two of the three judges applied this common law principle directly to govern the shipowner-seaman relationship. In treating land-based employees and seamen as being subject to the same law, the court had disapproved the earlier rule imposing a heavier burden of proof to be met by seamen in their claims for damages. Thus for the first time, seamen enjoyed the same remedies for injuries as their counterparts on land. The efficacy of such remedies would depend on the ambit of the principle. In the House of Lords case of Wilson and Clyde Coal Co. Ltd. v. English, Lord Maugham, after discussing the authorities, enunciated the threefold duty as follows:<sup>11</sup>

"...there was a duty on the employer to take reasonable care and to use reasonable skill, firstly to provide and maintain proper machinery, plant, appliances, and works; secondly, to select properly skilled persons to manage and superintend the persons; and thirdly to provide a proper system of working."

The above duty areas are zealously regarded as being in the province of the employer. It follows that although a shipowner may engage agents or other persons to do the work, he is nonetheless personally

8. (1858) Macq. 266, approved by the House of Lords in Wilson & Clyde Coal Company Ltd. v. English [1938] A.C. 57.

9. (1858) 3 Macq. 266, cited with approval by Byles, J., in Searle v. Lindsay (1861) 11 C.B. (N.S.) 428, 439.

10. (1861) 11 C.B. (N.S.) 428. The application of common law duty of the master to a seaman was later approved by the High Court of Australia: (1942) C.L.R. 624, p. 637.

11. [1938] A.C. 57, 86.

answerable for breach of any aspect of the non-delegable duty. Moreover, as against seamen, as employees, it cannot be asserted that they have accepted the risk of injury due to non-performance by ship-owners of any aspect of their duty.

An Australian case of outstanding significance is Huddart Parker Ltd. v. Cotter.<sup>12</sup> The matter was not resolved until after two trials before the Supreme Court of New South Wales and several appeals to the Full Court of the Supreme Court and the High Court of Australia. While the ship S.S. Zealandia on which C was employed as fireman was about thirty miles off the coast of Victoria, something happened to one of her boilers. When a steel stay in boiler No. 7 broke, part of it and the attached nut fell into a combustion chamber. A hole resulted through which water flowed into one of the furnaces. Water accumulated in a dangerous volume. The engine-room staff dealt with the emergency by pulling the fires from the high furnaces on the stokehold floor where they were extinguished with water. The door of the central furnace was opened to release the water which gushed out flooding the floor and filling the stokehold with steam. While attempting to avoid the water, the respondent (C) was scalded by falling on the stokehold floor as a result of colliding with another fireman.

In the second trial, the court accepted the evidence given for C by two witnesses as regards the dangerously corroded condition throughout the whole length of the broken stay. The corrosion was of such long standing that it must have been apparent to any skilled person who examined the stay with due care before the accident. The jury returned a verdict for C for £2,800. On further appeal to the High Court, the verdict was upheld, thus reversing the decision of the Full Court of the Supreme Court. McTiernan, J., said:<sup>13</sup>

"Accordingly, I think there was evidence justifying the finding that the appellant broke its duty to maintain the boiler properly. This was the 'personal negligence' of the appellant...."

12. (1942) 66 C.L.R. 624.

13. Ibid., p. 642; see also, ibid., p. 641.

This decision is seen as an epoch-making event for injured seamen who seek damages at common law. Unfortunately, the burden of proving the shipowner's negligence, the weak financial position of seamen and the necessity of testifying personally in court are factors which deter most plaintiff seamen from instituting proceedings.

To obtain a balanced view, one has to move back into the past and consider the development from a different angle. In replacing the anachronistic rules, which largely negated the rights of injured seamen, the common law also introduced the doctrine of common employment. For many decades, its operation had grave consequences for damage suits by seamen.

In Searle v. Lindsay and Another, decided in 1861, the injuries suffered by the third engineer were caused by the neglect of the ship's chief engineer. Judgment was unanimously given for the ship-owners. Byles, J., fully endorsed the opinion of Lord Cranworth:<sup>14</sup>

"The law of England considers that the person who undertakes the service undertakes it knowing that he is liable to injury as well as from accidents that cannot be guarded against as from neglect or mismanagement on the part of those who are engaged with him in the common occupation."

The force behind the doctrine was probably the strong economic pressure exerted by employers. In accepting the stipulated remuneration, servants were deemed to have voluntarily agreed to run the risks of injury or damage by fellow-workers.

The doctrine was of sufficiently wide scope to defeat claims for damages for the deaths of seamen due to the negligence of the ship's master. In Jessie Hedley v. The Pinkney & Sons Steamship Co. Ltd.,<sup>15</sup> the deceased was one of a crew of six engaged on a vessel proceeding from London to Cardiff. Although the vessel had on board the stanchions and rails, they were not put into the apertures so as to make the bulwarks of about four-and-a-half feet high. The deceased was engaged in securing a tarpaulin over a hatch. Owing to a violent lurch of the vessel, he lost his hold and footing, and fell overboard through an opening in the bulwarks. The tragic accident would not

14. (1861) 11 C.B. (N.S.) 428, 438-439.

15. [1894] A.C. 222.

have happened if the rails had been fixed. At the trial, the jury returned a verdict for the plaintiff for £175. On appeal, the Court of Appeal set aside the judgment. The House of Lords, affirming the Court of Appeal decision, held that the deceased's representatives had no claim for damages against shipowners. Under the doctrine, a ship's master was regarded as being in common employment with the deceased. The decision was wide enough to protect shipowners and demise charterers from liability for injuries, damage and death caused by the negligence or omission of any shipowner's servant on board. Probably the doctrine could extend to almost any injury suffered by an employee. The mishap due to a fellow employee's negligence or default might occur in navigation, ship management, cargo stowage or any of the ship operations.

In the High Court case,<sup>16</sup> *McTiernan, J.*, cited with approval the opinion of Lord Wright who said:

"It may be difficult in some cases to distinguish on the facts between the employers' failure to provide and maintain and the fellow servants' negligence in the respects indicated."

It is clear that, so long as the spheres of operation of the non-delegable duty of shipowners and the doctrine of common employment were imprecise, problems would remain.

### 3. Statutory Intervention

It will be recalled that before the end of the nineteenth century the general framework for safety in navigation mainly around Australian waters had been laid by the colonial legislatures. Among the measures introduced was the prohibition to send a ship out to sea in an unseaworthy state which would endanger life. Breach of the safety provisions would result in penalties being imposed on shipowners and the ship being detained. One glaring defect of the colonial shipping legislation is that it fell drastically short of placing shipowners and masters under a personal obligation towards seamen to ensure the seaworthiness of the ship. This anomaly had for many decades stood out as a gross injustice in that seamen, who were injured or killed as a result of the unseaworthiness of the ship, would have

16. Huddart Parker Ltd. v. Cotter (1942) 66 C.L.R. 624, p. 640.

no remedies. In contrast, a shipper or charterer whose goods were damaged through the ship's unseaworthy condition could recover damages.

The breakthrough came when the serious gap was filled by section 5 of the Merchant Shipping Act 1876 (Imp.).<sup>17</sup> It imported into every contract of service between the shipowner and a seaman an implied obligation. This meant that -

"[the shipowner] the master and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same."

The provision was viewed as "the charter of British seamen's rights". With one exception, it was not adopted by most of the Australian States until several decades later. The Victorian Marine Act 1890 was the first to enact the provision in section 103. Unfortunately the unenlightened approach of the Supreme Court of Victoria and the wrong construction put on the section had thwarted the legislature's intention. In Kilpatrick v. Huddart, Parker & Co. Ltd.,<sup>18</sup> a steamer owned by the defendant company foundered. The deceased serving on board as engineer was drowned. In the trial, judgment was given for the deceased's representative on the finding that the ship was sent out to sea in an unseaworthy state. On appeal, a new trial was ordered on the ground that the verdict was against the weight of evidence. In ordering the new trial, Madden, C.J., held *inter alia*, that the statutory certificate as to seaworthiness given under the 1890 Act (Vic.) was conclusive as regards the state and condition of the ship at the time it was given. In fact, he reverted to the pre-1890 position. He held that the certificate was conclusive as to the ship's seaworthiness unless the owner or his agent had concealed the defect or neglected to provide against obvious defects calculated to endanger the ship. In so far as the decision failed to emphasise the non-delegable nature of the statutory obligation imposed on shipowners, the masters and the agents, it was totally unsatisfactory.

17. 39 & 40 Vic., c. 80.

18. (1895) 21 V.L.R. 125.



The hazards which attended employees engaged in the shipping industry were common knowledge. An example of colonial legislation aimed at alleviating the hardships of seamen due to injuries is the Employers' Liability Act 1886 (N.S.W.).<sup>19</sup> By section 4, a labourer, who was injured while employed in loading or discharging a ship alongside a wharf, could bring an action against his employer. Later by section 6 of the 1893 amending Act,<sup>20</sup> the right of action was extended to a seaman injured in similar operations. In Ex parte Aucher,<sup>21</sup> the plaintiff, while on a voyage from New Zealand to Sydney and carrying out the orders of the mate, sustained a broken leg and serious injuries to it. All three judges of the Court of Appeal upheld the decision of the Judge in Chambers by dismissing the appeal. The provision only allowed a seaman to bring the action in respect of injuries received when the ship "is moored or at anchor receiving or discharging cargo."

The "seamen's charter" provision in the Merchant Shipping Act 1876 (Imp.) was later consolidated as part of the Merchant Shipping Act 1894 (Imp.). Now that it has become a permanent feature of seamen's employment contracts, it is vital to ascertain its sphere of operation.

By section 261, Part II of the 1894 Act (Imp.)<sup>22</sup> applied to sea-going ships registered out of the United Kingdom and to the owners, masters and crews.

Paragraph (c) of section 261 included ships employed in trading between any port in the United Kingdom and any port not situate in

19. 50 Vic. No. 8.

20. 56 Vic. No. 6.

21. (1896) 17 N.S.W.R. 435. Another example of the illogical distinction made between seamen and other workers is found in Hanson v. A.S.N. Co. (1884) W.N. (N.S.W.) 75. The plaintiff sailor, who was injured by the negligence of certain employees of the defendant company, was held not to be entitled to sue under the Employers' Liability Act (46 Vic. No. 6). The court held, inter alia, that a sailor was not a workman within s. 9 of the Act. Moreover, it was at any rate unfairly presumed that in passing the Merchant Seamen's Laws Consolidation Act (27 Vic. No. 13) the legislature had intended seamen to be treated differently.

22. Until its repeal by Merchant Shipping Act 1970, (U.K.), s. 100 and Schedule 5.

the British possession or country in which the ship was registered. It followed that virtually all agreements with crews in colonial or foreign ports, which came within paragraph (c), had to be in the form required by and subject to the Act. The statutory form of agreement did not apply where seamen were engaged in a British possession, e.g. an Australian State, where the ship was registered.

Subject to two exceptions, section 458 (1) of the 1894 Act (Imp.) imports into every agreement with seaman the obligation of the shipowner, the master and the loading agent as to the seaworthiness of the ship. As it operates "notwithstanding any agreement to the contrary" its effect is to nullify any clause which in any way reduces or excludes the non-delegable obligation. It ensures that the rights and interests of seamen are protected despite the subtle means used by shipowners.

Section 458 (2), which concerns the two exceptions, reads:

"Nothing in this section -

- (a) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the sending of the ship in such a state was reasonable and justifiable; or
- (b) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession."

The onus of proving that a particular voyage comes under exception (a) or (b) is on the shipowner, master or the loading agent. Cases of "special circumstances" under (a) would include taking a ship out of enemy control or territory, seeking or providing help in an emergency, sending far out to sea for destruction a ship carrying dangerous chemicals or a leaky cargo of oil, and so on. It is submitted that, unless the service contract otherwise provides, a seaman has to bear, without the right of recourse, the injury or damage suffered due to the ship's unseaworthiness. The rivers and lakes within exception (b) are generally located on the landward side of a British possession, e.g. an Australian State. Consequently, the ships or boats used on such waters are by their design not suited for navigation in the open seas. Obviously, one underlying reason for exception (b) is to allow the local legislature regulate the service contracts of seamen employed on such vessels.

An improved version of the Imperial section 458 (1) has been re-produced in section 59 of the Navigation Act, 1912-73 (Comth.). Its object is to confer wider protection on seamen and apprentices than its Imperial counterpart. With the exception of employment on a river or bay ship, a ship cannot be taken to sea with a seaman as crew member unless a service agreement has been entered into in the manner required. The wording of section 59 (a) is such that the personal obligation imposed on shipowners is mandatory and is not dependent on the existence of a formal service agreement. Its scope is broadened by section 6D (1) of the Act (Comth.). A ship is deemed to have been taken or sent to sea if she has been got under way for the purpose of going to sea, plying or running, or proceeding on a voyage. Like its Imperial counterpart, the implied obligation as to seaworthiness does not extend to seamen engaged on vessels used on inland rivers and lakes.

In Australia, an authoritative pronouncement relating to the relationship between the threefold duty of care owed by employers at common law and the obligation implied by statute was made by the High Court. In Huddart Parker Ltd. v. Cotter,<sup>23</sup> the Navigation Act, 1912-1935 (Comth.) applied to the voyage by ship during which a seaman was injured. It was held that where the injury was caused by defective equipment amounting to unseaworthiness, the plaintiff could not set up against the owner any contractual duty of care implied at common law, but must rely on the obligation as to seaworthiness implied under section 59. The dissenting judgment of McTiernan, J., is more favourable to seamen. It was his firm belief that the statutory obligation was intended to supplement, and not to supersede, the duty implied at common law. He said:<sup>24</sup>

"This section [i.e. 59] does not, in my opinion, derogate from the common law rights of a seaman. It adds to his rights and ensures greater protection for him."

According to Williams, J., with whom Rich, J., agreed, the personal obligation imposed by section 59 is not that of an insurer. It is one requiring due care to be used so that "the plaintiff must prove not only that the defective condition of the stay (equipment, machinery, etc.) made the ship unseaworthy but also the failure to discover

23. (1942) 66 C.L.R. 624.

24. Ibid., p. 637.

the defect before the voyage began was due to negligence."<sup>25</sup> Except that it is not an absolute warranty, the statutory obligation is to be construed in a manner similar to the common law warranty in favour of shippers. The criterion to be used is the same. If the defect, which renders the ship unfit for the due and safe carrying of the goods or crew, cannot be readily rectified during the voyage, it will constitute unseaworthiness.<sup>26</sup>

Williams and Rich, J J., went further than was necessary in stating that the obligations imposed by section 59 and at common law were not intended to co-exist.<sup>27</sup> In their view after its enactment, no additional contractual duty of care could be implied at common law against a shipowner in the same field as that occupied by the statutory obligation. It is submitted that the view is not tenable on two grounds. Firstly, there is the well recognized presumption used in interpreting statutes. In the absence of clear indication in the statute, it will not be so construed as to take away rights implied at common law. The wording of section 59 does not justify the view in question. Secondly, the likelihood of injury to seamen, as a foreseeable occurrence, unless proper equipment and competent workmates are provided by an employer, will give rise to a duty of care at common law independently of contract. A seaman, who is injured as a result of his employer's breach of such duty, is entitled to recover in tort.

#### 4. Abolition of Doctrine of Common Employment

Lord Wright made an astute remark that the doctrine which was hinted at in connection with a butcher's cart "has roamed in its application to colliers, seamen...and indeed every sphere of activity."<sup>28</sup> The doctrine had given rise to serious complications in Australia, as a Federation, due largely to the lack of uniformity of the State laws. In Huddart Parker Ltd. v. Cotter,<sup>29</sup> the seaman who was employed at

25. Ibid., p. 665.

26. Gilroy, Sons & Co. v. Price & Co. [1893] A.C. 56 and Ingram & Royle Ltd. v. Services Maritimes du Treport [1913] 1 K.B. 538, p. 543, reversed on another point in [1914] 1 K.B. 541.

27. (1942) 66 C.L.R. 637, p. 653.

28. Wilsons and Clyde Coal Co. v. English [1938] A.C. 57, p. 80.

29. Supra. For decision of the Full Court of the Supreme Court of New South Wales, see Cotter v. Huddart Parker Ltd. (1941) 42 S.R. (N.S.W.) 33.

Sydney was injured while the ship was in Victorian waters. On the presumption that his injuries were negligently caused by a fellow-worker, both the Supreme Court of New South Wales and the High Court had misgivings as to what law should apply to the claim. The employment contract being made in Sydney was subject to the Workers' Compensation Act 1926-1938 (N.S.W.),<sup>30</sup> section of 65 of which abolished the doctrine of common employment. For the appellant company it was vigorously argued that Victorian law should apply. Firstly, the ship, being registered in Melbourne, would be subject to the law of the country to which she belonged. Secondly, the injuries arose when the ship was in Victorian waters. Victorian law retained the doctrine to the extent that it was a defence in an action founded on the breach of the duty of an employer to his employee at common law.<sup>31</sup> A further argument raised by the appellant company was not altogether devoid of substance. As the employment contract made in Sydney was, as to its form and content, governed by section 46 of the Navigation Act 1912-1935 (Comth.), the relations between the shipowner and a seaman should be governed exclusively by Commonwealth law. The common law of the Commonwealth incorporating the doctrine of common employment was alleged to have been imported into the contract. This contention, if accepted, would also constitute a defence. To resolve the difficulty, Williams, J., invoked what is known as "covering the field" principle. He said:<sup>32</sup>

"But having regard to the comprehensive scope of the Navigation Act, to express terms, and to the inconvenience and confusion that would arise if seamen serving on interstate ships were subject or not subject to the doctrine of common employment...it appears to me that the Commonwealth Parliament, when it enacted Div. 8, evinced a clear intention that as between itself and the States its legislation should thereafter completely, exhaustively and exclusively occupy the legislative field with respect to the rights and liabilities attaching to agreements entered into between

30. Act No. 15, as amended.

31. (1942) 66 C.L.R. 624, pp. 638-639.

32. *Ibid.*, p. 656. McTiernan, J., gave the dissenting judgment and upheld the verdict of the trial court for the plaintiff. It is submitted that his view was correct that the evidence justified a finding of negligence within the employer's province. The appeal was allowed by Williams and Rich, J.J., who set aside the verdict of the trial judge for the injured seaman.

masters and seamen of ships subject to the Act, so that any subsequent State legislation which purported to affect the obligations of the contract at common law as they then existed would be inconsistent with the Commonwealth law under sec. 109 of the Constitution and would be to the extent invalid."

The need for High Court Judges to apply the principle and the uncertainty as well as confusion posed by the doctrine are strong factors which led to its abolition by the Navigation Act Amendment Act 1958 (Comth.). For the first time, seamen engaged on ships proceeding on inter-State or overseas voyages were afforded wider protection. Thus where injury or damage is negligently caused to any seaman by another person in common employment with the former, the employer is liable in damages. Where the Navigation Act 1912-73 (Comth.) applies, the doctrine can no longer avail a shipowner as defence in actions for damages based on vicarious liability. Naturally the same protection is enjoyed by seamen employed under intra-State service contracts where under the proper law the doctrine has been abolished.

#### 5. Redress for Personal Injuries under Admiralty Law

The Commonwealth Navigation Act and the State navigation legislation have left out of their scope claims for injuries suffered by seamen. The reasons are found in the incidents of colonial history.

Claims against shipowners can be pursued by proceedings in personam or in rem. The latter are often instituted by claimants under the maritime laws of many British Commonwealth countries. When the ship is within the court's jurisdiction she can be arrested, even though her owners or agents are resident in another country.

In one important respect, Australia is different from Great Britain or Singapore. The admiralty jurisdiction exercisable by the State Supreme Courts and the High Court is derived largely from Imperial statutes, viz. the Admiralty Court Act 1861 and Colonial Courts of Admiralty Act 1890.<sup>33</sup> It is, therefore, relevant to consider the sort of injuries suffered by seamen that will give rise to admiralty actions in rem.

The 1861 Act reads:

- "7. The High Court of Admiralty shall have jurisdiction over any Claim for Damage done by any ship...
35. The Jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by Proceedings in rem or by Proceedings in personam."

33. 24 Vic., c. 10, and 53 & 54 Vic., c. 27, respectively, infra.

The words "damage done by any ship" had canvassed many legal opinions and produced a great deal of litigation. In The Beta,<sup>34</sup> the Privy Council decided that section 7 embraced every possible kind of damage, including personal injuries. The English courts had difficulty in reconciling that section with the provisions of Lord Campbell's Act, which dealt with general injuries not caused by any ship.<sup>35</sup> Moreover, there was an important difference between the admiralty and the common law rules as to contributory negligence. It became essential to distinguish between injuries which were done by a ship, and therefore within section 7, and those which were not.

The criterion is found in the words of Brett, M.R., "a case in which a ship was the active cause, the damage being physically caused by the ship,"<sup>36</sup> and those of Bowen, L.J., "damage done...by those in charge of a ship, with the ship as a noxious instrument."<sup>37</sup> A review of the cases where admiralty jurisdiction of the Court was successfully invoked indicates the types of accidents, resulting in injuries to seamen, that will come within the criterion. In the New Zealand case of The Queen Eleanor, a stevedore's workman fell into the ship's hold. This was caused by some defect in the hatchway. Stout, C.J., said:<sup>38</sup>

"But for the decisions I have referred to I shall have thought that the words of the section were wide enough to cover such a class of case, but in interpreting the English Act I am bound by English decisions. It was, in my view, the ship that did the damage by her faulty construction; but that is not the meaning of 'done by the ship' which the English courts have held to be within the jurisdiction of the Admiralty Court."

34. (1869) L.R. 2 P.C. 447. In delivering the Privy Council judgment, Lord Romilly said:  
"The words of the 7th section of the Admiralty Court Jurisdiction Act 1861...clearly include every possible kind of damage. Personal injuries are undoubtedly within the words 'damage done by any ship': ibid., p. 449. Cf. Smith v. Brown (1871) L.R. 6 Q.B. 729 where the proposition was overruled on prohibition.
35. In Mary Seward v. The "Vera Cruz" (1884) L.R. 10 C.P. 59, the House of Lords held that s. 7 of the Admiralty Court Act 1861 (Imp.) did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act (9 & 10 Vic., c. 93). Moreover, the English Admiralty Division could not entertain an action in rem for damages for loss of life under the Lord Campbell's Act. See H. Rentree, the Federal Judicial System of Australia (1984 ed.), p. 255, where the same view is held.
36. The "Vera Cruz" [No. 2] (1884) 9 P.D. 88, p. 99.
37. Ibid., p. 101.
38. (1899) 18 N.Z.L.R. 78, 84. It was held that under s. 7 the court had no admiralty jurisdiction over the matter.

In Wyman v. The "Duart Castle",<sup>39</sup> an engineer was scalded through the breaking of a stop-valve in a steamer. McLeod, J., held that the injury was damage done by the ship.

The case of Nagrint v. The Ship "Regis"<sup>40</sup> concerned an action in rem brought in the High Court by a passenger who was injured in somewhat unusual circumstances. The plaintiff was a passenger-sight-seer on board the Regis which was following an American cruiser down the harbour. Owing to negligent navigation, she approached too close to the cruiser. In changing course to avoid a collision, she capsized, struck and injured the plaintiff, precipitating her into the water. It was held that "proceedings in rem lie" under section 7. Dixon, J., who gave the judgment said:<sup>41</sup>

"Her [ship's] behaviour as an active agent was the direct cause of the harm, and in that sense she was the noxious instrument."

Injury to seamen as a result of negligent management or navigation of the ship as a moving object is deemed to be within the criterion. The same reasoning can apply to injuries caused by the unseaworthiness of the ship for which, as we have seen, the owner is personally responsible. Common instances of unseaworthiness giving rise to negligent management or navigation include undermanning of the ship,<sup>42</sup> bad stowage of cargo,<sup>43</sup> incompetent crews<sup>44</sup> and failure to have a pilot on board when required by law.<sup>45</sup>

39. (1899) 6 Can. Ex. C. 387. The action, however, was dismissed as the plaintiff failed to produce reasonable evidence of negligence as the cause of the accident.

40. (1938-1939) 61 C.L.R. 688.

41. Ibid., p. 700.

42. According to Carver's Carriage of Goods by Sea (12th ed. 1971), vol. 1, para. 108, "She must have a competent master and a competent and sufficient crew." The absence of her chief officer was held to render a ship unseaworthy: Burnard & Alger v. Player (1928) 31 Ll. L.R. 281. See also the Hague Rules III, rule 1 (b).

43. In Elder, Dempster v. Paterson, Zochonis (1903) 9 Asp. M.L. 475, the House of Lords held that, although the ship was structurally fit to carry the oil, she was unseaworthy because of bad stowage.

44. William Tetley, Marine Cargo Claims (2nd ed. 1978) op. cit., p. 161, summarises the authorities in these words: "A vessel is not seaworthy...if the crew are inexperienced and untrained in the operation of the ship and the owner fails to see that they are properly instructed in the ship's special features."

45. Dixon v. Sadler (1841) 5 M & W 405, 414, 415; The Framlington Court (1934) 69 Fed. Rep. (2d) 300.



Another category of mishaps attributed to improper or careless operation or use of the ship's machinery or equipment should be considered. It will indicate the possible scope of the criterion. In Union Steamship Company of New Zealand Ltd. v. Ferguson,<sup>46</sup> F who was a crew member brought an action in rem in the original jurisdiction of the High Court. As a result of the negligent operation of the ship's winch by a servant of the defendant, F lost his balance and fell into the ship's hold, sustaining injuries. Windeyer, J., had some doubts whether "all industrial accidents occurring by the negligent use of any of a ship's equipment in loading or unloading of cargo in Australian ports" could properly fall within the rule. He felt urged by the weight of similarly decided cases to give judgment for F. The appeal was unanimously dismissed. Barwick, C.J., said:<sup>47</sup>

"But on the footing that it was the movement of the lid which precipitated the respondent into the hold, I am content, though not without some hesitation, to accept the finding that the fall of the respondent was caused by the ship in the relevant sense."

The view taken by his Honour has the merit of extending, by analogy, the criterion to an unclosed category of mishaps.

In practice, there are many accidents on board the ship resulting in injuries which fall outside the criterion. After discussing the authorities, Dixon, J., attributed them to "some defect in the condition of the ship considered as premises or as a structure upon which the person injured is standing, walking or moving, the ship [being] treated as no more than a potential danger of a passive kind, a danger to the user, whose use is the active cause of the injury."<sup>48</sup>

46. For judgment of Windeyer, J., see [1968] A.L.R. 371.

47. [1969] A.L.R. 409, p. 411.

48. Nagrint v. The Ship Regis (1938-1939) 61 C.L.R. 688, p. 700. In The Thefta [1894] P. 280, the plaintiff brought an action in rem claiming damages for personal injuries. They were caused when he fell down into the hold of the vessel because the hatchway was covered with tarpaulin. The action was dismissed on the ground that the "damage was not done by the ship." The reasoning was followed in Mulvey v. The Barge "Neosho" [1919] 47 D.L.R. 437.

Hence a passenger, invitee and seaman injured in such circumstances will be unable to succeed in actions brought under section 7 of the Admiralty Court Act 1861 (Imp.).

#### 6. Statutory Compensation

We have seen the serious gaps in section 7 of the Admiralty Court Act 1861 (Imp.). Australian courts have no jurisdiction to entertain claims in rem for personal injuries which are not "done by any ship" and for loss of life. It will be recalled that, with the exception of McTiernan, J., the High Court Judges held that the seaworthiness obligation under section 59 had superseded the duty of care owed to seamen at common law.<sup>49</sup> The decision has far-reaching consequences. It implies that neither the shipowner nor the ship could be held liable where injuries are caused by defects in the ship, equipment or machinery, which do not constitute unseaworthiness. Apart from the burden of proving that the shipowner or his servant was negligent, few seamen who are injured have the financial means of instituting actions in rem against the ship.

Seamen have long been recognised as a class which the law favoured on account of their importance to the nation. So far as the position under English law was concerned, the anomalies were in small part removed by the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.).<sup>50</sup> Section 22 (2) enlarged the admiralty jurisdiction of the High Court in respect of claims for damage to cover claims for loss of life and personal injuries. It was by the Administration of Justice Act 1956 (U.K.)<sup>51</sup> that the long-awaited reforms were introduced. The right under section 1 (1) (f)<sup>52</sup> to institute proceedings in rem against the ship was not confined to seamen or their personal representatives. It extended to -

"any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control

49. Huddart Parker Ltd. v. Cotter (1942) 66 C.L.R. 624.

50. 15 & 16 Geo. V, c. 49.

51. 4 & 5 Eliz. II, c. 46.

52. Re-enacted in Supreme Court Act 1981 (U.K.), s. 20 (2) (f).

of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible...."

The disadvantaged position of seamen under English law was substantially rectified by extending the admiralty jurisdiction.

In Australia, the Commonwealth Parliament was not fully competent to enact similar legislation.<sup>53</sup> This fact explains why the development in this area of maritime law stopped. Consequently, the approach which the Commonwealth and State Parliaments adopted to deal with the problems was based on the Workmen's Compensation Act 1906 (U.K.).<sup>54</sup> We shall ascertain how far the gap in the law has been closed.

An early attempt by the Commonwealth Parliament to alleviate the hardships of seamen failed. In The Owners of the S.S. Kalibia v. Alexander Wilson,<sup>55</sup> a seaman, who was shipped at Sydney for the voyage to Brisbane and back, was injured by accident during the voyage. The ship was detained under section 13 of the Seamen's Compensation Act 1909 (Comth.) until security was given for the payment of any compensation that might be awarded against the shipowners. Section 4 contained provisions which went beyond the limits of the Parliament's constitutional power in so far as they purported to deal with purely internal coasting trade. The invalid provisions were so inseparably bound up with the valid ones that the High Court declared the entire Act to be void.<sup>56</sup>

Barton, J., and the respondent's counsel were of the view that the Act concerned matters of admiralty and maritime laws. It is submitted that seamen's compensation legislation could be treated as an outgrowth of Australian maritime law.

The Seamen's Compensation Act 1911 (Comth.) ushered in a new era for the seafaring industry in Australia. With the exception of

53. I.e. before the Statute of Westminster Adoption Act 1942 (Comth.) was passed. See Chapter Three.

54. 6 Edw. VII, c. 58, ss. 5-7.

55. (1910) 11 C.L.R. 689.

56. In any case, the 1909 Act was repealed by the Seamen's Compensation Act (Comth.) (No. 13 of 1911), s. 18.

ships engaged in intra-State trade and in the naval or military service, the Act applies to the employment of seamen on virtually all other ships. The policy of the legislation is to afford protection to seamen of all nationalities. Seamen engaged on ships not registered in Australia can take advantage of the Act if they were employed under articles of agreement made in Australia and at the material time the ship was subject to the Commonwealth law.<sup>57</sup> Due to the 1973 amendment, the Act is given a wider scope of operation.<sup>58</sup> By complying with the conditions laid down in section 4 (1) (b) or (c), seamen who are employed on British or foreign ships may claim the compensatory benefits of the Act.

We shall consider the main advantages enjoyed by seamen. Firstly, minor exceptions aside, the Act imposes no-fault liability for injuries or death caused to seamen arising out of or in the course of their employment.<sup>59</sup> Shipowners, demise charterers and other persons, as employers, are liable to pay compensation which is computed according to the First and Third Schedules to the 1973 Act (Comth.).

Secondly, the rules laid down by Australian courts as to the burden of proof to be discharged greatly favour claimants seeking compensation for loss of life. The issue before the court in Nelson v. Mutton<sup>60</sup> was whether the captain of the S.S. Poobar committed suicide or died in an accident. There was evidence that he had suffered from high blood pressure, headaches and giddiness. He disappeared in the early morning of 13th March, 1933, when the ship was proceeding along the eastern coast of Australia. An award of \$500 was made in favour of the applicants. It appears that his status coupled with the demanding responsibility as captain would lead to a somewhat more favourable inference to be drawn. Thompson, D.C.J., said:<sup>61</sup>

57. Seamen's Compensation Act 1911-73 (Comth.), s. 4 (1) (c).

58. I.e., s. 4 (1), as amended by Act (Comth.) (No. 216 of 1973), s. 3.

59. Ibid., s. 5 (1).

60. (1934) 8 A.L.J. 30.

61. Ibid., p. 31.

"The fact that the captain...placed himself in a position where he might meet with danger, would not deprive his dependants of the right to say that his death was accidental...."

The High Court dismissed the appeal. Rich, J., put forward two valuable guidelines to deal with cases of this type, and arrived at the conclusion that the deceased fell overboard by accident. The first was to "weigh probabilities and balance them at their respective value, the one against the other." The second was that the suggestion of suicide had to be supported by substantial evidence.

In essence, the propositions of Rich, J., were unanimously endorsed by all three judges in Spiratos v. Australasian United Steam Navigation Co. Ltd.<sup>62</sup> what for Rich, J., was the second guideline was for their Honours a presumption operating at the outset in favour of the deceased against suicide. In place of the twin guidelines, a single criterion has been laid down, reducing further the burden of proof. Their Honours said:<sup>63</sup>

"...if nothing relevant were proved except that the deceased disappeared from a ship at sea, the only proper inference would be that he fell overboard accidentally. If other relevant facts are proved, these must be taken into account along with the presumption, and the question at the end of the case is...whether, having regard to the evidence and to the presumption, there is a real balance of probability that the death was accidental."

In this case, a competent and able-bodied seaman disappeared at night from the ship S.S. Caloudra at sea. The High Court dismissed the appeal against the magistrate's decision that death was on the balance of probability caused by suicide. Thus the shipowner was exonerated from liability to pay compensation. An affirmative finding of death by accident was rendered impossible by two weighty factors. These were the fine weather conditions prevailing at the time of his disappearance and the deceased's worries over the possible loss of his entire savings in a cafe business.

Thirdly, the support given by courts to implement legislative policy on the subject is fairly consistent. In the interests of seamen,

62. (1955) 29 A.L.J. 376.

63. Ibid., p. 377.

the words "accidents arising out of and in the course of the employment" have been given a wide interpretation over the years. The reasoning in McKenzie v. William Holyman & Sons Pty. Ltd.<sup>64</sup> shows that judges take into account the heavy demands made on seamen in unpredictable circumstances. While P, a seaman, was returning from a public house to the ship, he stumbled on the wharf and fell into the water between the ship and the wharf. During the rescue operations, McKenzie who was a seaman and fireman held a lantern to enable others to see what they were doing. He fell from the edge of the vessel and was drowned. The High Court allowed the appeal of the deceased's wife and daughter against Wasley J.'s decision. Latham, C.J., is credited with having laid down a just and practical rule in determining the liability of employers. He said:<sup>65</sup>

"...if the act out of which the injury arose is sufficiently connected with the business of the employer to entitle the employer to direct the particular employee to do the act in question if the emergency had arisen in the presence of the employer, then the fact that the act is done voluntarily by the employee...does not remove the act from the course of the employment of the employee."

McTiernan, J., held that the mishap arose out of and in the course of doing something incidental to the employment. The tendency of courts is to bring within the ambit of employment a variety of acts and services not strictly part of an employee's duty. Menzies, J., has aptly summed up the situation when he suggested that the concept of the course of the worker's employment has been gradually widened by decision after decision.<sup>66</sup>

Despite the High Court's finding in McKenzie v. William Holyman & Sons Pty. Ltd. for the plaintiffs, the decision of Wasley, J., the trial judge, brought to light a defect in the law.<sup>67</sup> It is unthinkable that where injuries are suffered by seamen during their presence on shore for valid purposes they are precluded from recovering compensation. The Seamen's Compensation Act, 1911 (Comth.) was accordingly

64. (1939) 13 A.L.J. 73.

65. Ibid., p. 74.

66. The Commonwealth v. Oliver (1962) 107 C.L.R. 352, p. 361.

67. (1939) 13 A.L.J. 73, p. 74.

amended in 1953<sup>68</sup> to provide for mishaps occurring on shore. Seamen were given wider protection.

Under section 5AA (1) (a) of the 1911 Act (Comth.), compensation is payable where personal injury is accidentally sustained by a seaman "while he is travelling to or from his employment."<sup>69</sup> In Davey v. Union Steamship Co. of New Zealand Ltd., a seaman was injured while on shore. A rather restrictive construction was given to section 5AA (1). Napier, C.J., said:<sup>70</sup>

"It...does not cover a seaman going to a race meeting or to a public house for a drink, or, as in the present case, for a stroll on shore to post a letter. On the evidence, the [seaman] was not travelling to or from the ship. He was returning from a shore walk."

The construction given to the provision in the Australian Coastal Shipping Commission v. Averell<sup>71</sup> rectified the harsh approach. When the vessel Lake Illawarra moored at Newcastle, the seaman being off duty between 5.00 p.m. and 8.00 p.m. left his ship to go to his home at Tighos Hill. At about 7.50 p.m. while driving back from his home to the ship, he was injured in an accident. His claim succeeded in a District Court. In the joint judgment dismissing the appeal brought by the Commission, the High Court distinguished and rightly refused to follow the previous decisions. Their Honours gave the following reasons for the judgment:<sup>72</sup>

"In this case the fact that the applicant was returning from his home to his ship provides the terminus a quo and the terminus ad quem for the seaman's journey, so that it was rightly held that, in the circumstances stated, he was travelling to his employment, notwithstanding that he was required to and did live on board his ship...Acceptance of the appellant's argument would hardly leave any scope for the application of s. 5AA (1) for all seamen upon sea-going ships are required to, and do 'live in'. This consideration is one which, we think, supports our conclusion."

68. See Act (Comth.) (No. 10 of 1953), s. 4.

69. See The Commonwealth v. Wright (1956) 96 C.L.R. 536, p. 552, where the meaning of a similar expression was considered.

70. Davey v. Union Steamship of New Zealand [1953] S.A.S.R. 35, p.

71. (1969) 43 A.L.J.R. 335.

72. Ibid., p. 335.

## 7. Commonwealth Legislation and Common Law

A seaman could not recover more than the stipulated amount by suing under the Navigation Act 1912-73 (Comth.) and the Seamen's Compensation Act 1911-38 (Comth.). In Lowry v. Huddart Parker Ltd.,<sup>73</sup> a seaman who was injured on board the ship became incapacitated for work and was landed at Newcastle. He received under sections 127 and 132 of the Navigation Act 1912 (Comth.) the total amount of £652 4s Od. for maintenance including the wages due. He further claimed from the respondent company weekly compensation under section 5 of the Seamen's Compensation Act 1911-1938 (Comth.). The claim was brought on the ground that, although he had "recovered" for the purposes of the Navigation Act 1912 (Comth.) he was still incapacitated for work by the injury. The judge held the compensation payable under section 5B of the Seamen's Compensation Act (Comth.) could not exceed £600. The appeal was therefore dismissed.

Since that decision, there have been a number of amendments to section 5B. They do not require account to be taken of the amounts received under the Navigation Act 1912 (Comth.). The principle underlying the amendments is in line with the view of the Supreme Court of South Australia judges, as follows:<sup>74</sup>

"Section 132 [of the Navigation Act] is not intended to take the place of the Seamen's Compensation Act 1911-1947 (Cth.) and provide workmen's compensation; it is something apart from that, which is necessitated by the special circumstances of the seamen's employment. He is entitled to receive full wages until he is certified to have recovered; he is also entitled to a free passage to his home port; and after both these benefits have been received, he is entitled to apply for workmen's compensation if his physical condition or state of health then warrants an award."

It is clear that receipt by a claimant of the full amounts payable under the Navigation Act 1912-73 (Comth.) and the Seamen's Compensation Act 1911-73 (Comth.) will not prevent him from suing in negligence. Thus in Union Steamship Company of New Zealand v. Ferguson,<sup>75</sup> the injured seaman in a subsequent admiralty action in rem recovered

73. (1942) 42 S.R. (N.S.W.) 62.

74. Radcliffe v. Howard Smith Ltd. [1948] S.A.S.R. 133 (in Banco), p. 139.

75. (1967-1969) 119 C.L.R. 191; Nagrint v. The "Regis" (1938-1939) 61 C.L.R. 688, applied.



a larger amount in terms of damages. The amount he eventually received was reduced by the total amount already paid to him under the two Acts.<sup>76</sup>

However, the right to sue in negligence is lost where a compensation agreement is reached and a memorandum thereof is recorded as provided by paragraph 8 of Schedule II.<sup>77</sup> In Riley v. Ampol Petroleum Ltd.,<sup>78</sup> R, an able-bodied seaman on the vessel P.J. Adam, was negligently injured about six miles off the coast of Western Australia. Pursuant to an agreement made between the plaintiff, R, and the defendant, the sum of \$135 was paid to R "in full and final settlement and discharge of all claims whether for compensation or otherwise...." Subsequently, R sued in negligence. In the High Court case of Joyce v. Australian United Steam Navigation, Latham, C.J., McTiernan and Rich, J.J., had construed the term "compensation" to include damages recoverable in tort.<sup>79</sup> Accordingly, seaman J., held that the provisions in paragraph 8 of Schedule II were not confined to compensation or any payment under the Seamen's Compensation Act 1911-68 (Comth.). As the agreement made between R and the defendant concerned rights under the Act (Comth.) and at common law, the recording of the memorandum had extinguished the claim. It will also prevent the claimant from bringing an action in rem against the ship.

#### 8. State Compensation Acts

It is interesting to consider how each State seeks to exercise jurisdiction over its seamen. New South Wales,<sup>80</sup> South Australia,<sup>81</sup> Victoria<sup>82</sup> and Western Australia<sup>83</sup> have adopted identical provisions

76. For position under the Seamen's Compensation Act 1911-73 (Comth.), see 10A (3).

77. It shall be enforceable as if it were a judgment of a county court.

78. [1972] 23 F.L.R. 351.

79. (1939) 62 C.L.R. 160.

80. Workers' Compensation Act (N.S.W.) (No. 15 of 1925) (re-printed 1972), s. 46 (2).

81. Workmen's Compensation Act 1971-79 (S.A.), s. 88 (1); this definition has remained unchanged since the Workmen's Compensation Act 1911, s. 13 (1).

82. Workers' Compensation Act (Vic.) (No. 6419 of 1958), s. 59 (2); this definition has remained unchanged since the Workers' Compensation Act (No. 2496 of 1914), s. 17 (1).

83. Workers' Compensation and Assistance Act (W.A.) (No. 86 of 1981), s. 16 (1).

to define the meaning of "State ship".<sup>84</sup> For example, section 46 (2) of the New South Wales Act reads:

"In this section, the term 'New South Wales ship' means any ship which is -

- (a) registered in this State; or
- (b) owned by a body corporate established under the laws of this State or having its principal office or place of business in this State or is in the possession of any such body corporate by virtue of a charter; or
- (c) owned by any person or body corporate whose chief office or place of business in respect of the management of such ship is in this State, or is in the possession of any such person or body corporate by virtue of a charter; or
- (d) owned by the Crown in respect of the Government of this State, or in the possession of the Crown in that respect by a virtue of a charter."

Thus, in respect of an injury to a seaman employed on a ship of any of the four States, the relevant Act has application. While paragraphs (b), (c) and (d) are sufficiently clear, paragraph (a) is no longer operative. Since the coming into force on 26th January, 1982, of the Shipping Registration Act 1981 (Comth.), there is only a single Ship Register at Canberra.<sup>85</sup> The various branch offices located mainly in Australian capital cities do not register ships. It follows that no ships are currently registered in Australian States. Moreover, ships previously registered in the Australian States under the Merchant Shipping Act 1894 (Imp.) had been transferred to the Commonwealth Ship Register. This development has greatly reduced the scope of the Workers' Compensation Act 1927 (Tas.). In relation to a seaman, the Act will only apply if he is a worker employed on (i) a ship "which is registered in this State", or (ii) "a ship whose first port of clearance and whose destination are within this State."<sup>86</sup> On

84. S. 4 (2) of the Workers' Compensation Act 1927 (Tas.) (18 Geo. V No. 82) provides that the "Act shall apply to a seaman only if he is a worker employed on a ship which is registered in this State, or a ship whose first port of clearance, and whose destination are within this State." The definition of "Queensland ship" is given in Queensland Workers' Compensation Act 1916-1965, s. 3 (1) (a).

85. Supra.

86. See s. 4 (1).

the other hand, the New South Wales<sup>87</sup> and Queensland Acts<sup>88</sup> are less affected as their sphere of operation is widely defined, including the use of the words in situation (ii).

In determining whether a seaman's claims will come within a particular Act, the meaning of the words used in situation (ii) need to be construed. Australian seamen engaged on foreign-going ships, which are not registered in Australia, are not protected by State legislation and, apart from two exceptions, the Seamen's Compensation Act 1911-73 (Comth.).<sup>89</sup> In Clarke v. The Union Steamship Company of New Zealand Ltd.,<sup>90</sup> the plaintiff whose home port was Sydney suffered injuries arising out of and in the course of his employment on board the ship Moana. Although she was registered outside the Commonwealth, the articles of agreement between the plaintiff and the defendant company were made in Sydney. She was engaged in trading between Sydney and San Francisco, and vice versa, calling at ports outside the Commonwealth. According to Griffith, C.J., the port of clearance was Sydney and the port of destination was San Francisco, and vice versa. The accident, which caused injuries to the seaman, occurred when the ship was some 200 miles from San Francisco on her return voyage to Sydney. A strong High Court held that in respect of any such voyage the port of clearance and the port of destination were not in the Commonwealth. In unanimously dismissing the plaintiff's appeal, the High Court held that Seamen's Compensation Act 1911 (Comth.) was not in force on the ship when the injuries were sustained. The overriding authority which led to the decision is the covering section 5 of the Commonwealth of Australia Constitution Act 1900 (Imp.), containing words similar to those in situation (ii). Section 5 enacts, inter alia, that "the laws of the Commonwealth shall be in force on all British ships, the Queen's ships excepted, whose first port of clearance and whose port of destination are in the Commonwealth."

So far as protection of seamen under legislation is concerned, uncertainty may arise where a ship under a time charter is required to make a number of voyages. Apart from the geographical limits

87. Workers' Compensation Act 1925 (N.S.W.).

88. Workers' Compensation Act 1916-1965 (Qld.), s. 3 (1).

89. See s. 74 (1) (b) and (c).

90. (1914) 18 C.L.R. 142.

within which the ship may be engaged and the time period as provided in the charter, the charterer often has the option of declaring ports of clearance and destinations for the voyages. It is likely that, with regard to some of the voyages, a State workers' compensation enactment may have no application. The reason is that the mishap can occur while the ship is under repair or on a voyage where the port of clearance and destination are not in the same State. A good example is furnished by the case of McKenny v. State Government Insurance Office (Queensland).<sup>91</sup> The vessel "Kos II" was chartered to the Commonwealth for four to six months for marine and geological work to be performed in several areas. From Brisbane, the first port of clearance, the ship sailed to a place off north-western Australia. The charter provided that after the trip, she was to put in at Darwin or Cairns before sailing to an area in the Solomon Sea and the south-west Pacific Ocean. In fact, on the way back to Townsville she struck a reef and repairs were necessary. When the ship was undergoing repairs at Townsville, M commenced duties as an engineer of the vessel. With the permission of the shipowner and ship-repairer, M lived on board the vessel which was in dry-dock. He was killed as a result of a fall from a ladder which provided access to the ship. The court found that at the time of the fatal accident the ship was being repaired for a voyage to an area in the Solomon Sea. President Matthews held that the vessel was not a Queensland vessel within the meaning of section 3 (1) (c) of the Workers' Compensation Act 1916-1966 (Qld.). M's wife was unable to recover compensation for her husband's death.

The grave setback for seamen has resulted from construing the word "destination" in the provision as the end of a voyage rather than the port where the venture ends after a series of voyages or on completion of the charterparty. It is submitted that the wording of section 3 (1) (c) of the Act 1916-1966 (Qld.) should not be given a narrow meaning. However, the unsatisfactory situation can in practice be overcome by an agreement made between a shipowner and the

91. (1972) Q.J.P.R. 138 (Ind. Ct. of Qld.). By ruling that the vessel "Kos II" was not a Queensland ship, President Matthews had reversed the decision of the magistrate.

seaman expressly extending the provisions of the legislation to cover the seaman for the whole period of employment or the charterparty.

The thrust of the workers' compensation legislation is towards alleviating the hardships of seamen. To give effect to the legislative policy, there should in such circumstances be a presumption in favour of the deceased's applicant. The decision in Ryan v. Selkirk<sup>92</sup> appears to support this view. S, the owner of a shark boat, The Robert John, entered into an agreement with X as regards its use for fishing operations. It provided that the gross return from the catch was to be shared between them. Both contemplated that a crew would be required. Consequently, X engaged Y and paid him a percentage of X's share after deducting the expenses. The boat was apparently returning to Victoria from a fishing trip in Tasmanian waters. She foundered and X and Y were drowned. Although from the case report she was presumed to be a Victorian ship under section 59 (2) of the Act (Vic.),<sup>93</sup> the circumstances of the tragedy made it uncertain as to where it actually occurred. Under section 59 (1), the Act (Vic.) will only have application where the injury or mishap occurs within the State of Victoria or its territorial jurisdiction. Despite the absence of evidence that Y went overboard from the boat after she had entered Victorian territorial waters, the Workers' Compensation Board assumed jurisdiction.<sup>94</sup> It held that the presumption that Y was a servant of S, the boat-owner, was not rebutted. An award of £2,400 was made for the applicant.

#### 9. An Evaluation

Unlike the State legislation, the Seamen's Compensation Act 1911-73 (Comth.) is deficient in one vital aspect. It is not mandatory for an employer, e.g. shipowner or demise charter, to take out and maintain a valid insurance policy to cover his statutory liability towards the seamen. Seamen, however, are protected where their right

92. (1955) 3 W.C.B.D. (Vic.) 227.

93. Workers' Compensation Act (No. 6419 of 1958) (Vic.).

94. A precedent is found in Chapman & Co. Ltd. v. Rose [1914] St. R. Qd. 302. A vessel engaged in trading between Queensland ports was last seen at anchor in Queensland waters during a cyclone. It was held that there was evidence that a seaman thereon lost his life in Queensland waters.

to compensation arises before the sequestration order is made against their employer, or before the company is wound up. Such claims are included among the debts to be paid in priority out of the property of a bankrupt or the assets of a company being wound up. Section 8 (3) further states that "the provisions of any laws relating to preferential payments in relation to bankruptcy and the winding up of companies shall have effect accordingly." The words "property" and "assets" in the section should include any ship belonging to the employer. It is submitted that rights accrued under this Commonwealth Act have priority over secured creditors such as ship mortgagees and maritime lienholders.<sup>95</sup> The Shipping Registration Act 1981 (Comth.) for example, does not provide that a registered mortgage of a ship or any share therein is preferred to a workman's compensation claim.

The preferential treatment does not avail seamen seeking compensation under the State legislation. This setback is overcome in an ingenious way. It is mandatory for employers to have in force an appropriate insurance policy. On the happening of certain events, e.g. the bankruptcy or winding up of the employers, seamen are entitled to the same rights and remedies as their employers have against the insurers.<sup>96</sup>

Another substantial benefit enjoyed by seamen is that the compensation payable under the Commonwealth and the State Acts<sup>97</sup> is not subject to the limitation of liability.<sup>98</sup>

The Seamen's Compensation Act 1911-73 (Comth.) makes provision for enforcing seamen's claims where the ship is owned by a non-Australian resident or by a corporation which does not have an office in

95. See Bankruptcy Act 1966-73 (Comth.), s. 109; for provisions under the Companies Code in each State, see s. 441 (f) and s. 448.

96. The seamen are subrogated to the rights exercisable by their insolvent employers against the insurers: Act (No. 15 of 1926) (N.S.W.), s. 49 (1); Act (1916-1965) (Qld.), s. 9A; Act (1971-79) (S.A.), s. 17 (1); Act (1927) (18 Geo. V, No. 82) (Tas.), s. 7 (1); Act (No. 6418 of 1958) (W.A.), s. 61 (1); Act (No. 86 of 1981) (W.A.), s. 173.

97. Act (No. 15 of 1926) (N.S.W.), s. 46 (3) (f); Acts (1916-1965) (Qld.) (No provision made); Act (1971-74) (S.A.), s. 89 (e); Act (1927) (18 Geo. V No. 82) (Tas.) (No provision made); Act (No. 6419 of 1958) (Vic.), s. 59 (3) (f); Act (No. 86 of 1981) (W.A.), s. 16 (2) (d).

98. See Navigation Act 1912-73 (Comth.), Part VIII, as amended, discussed in Chapter Eight.

Australia. Under section 13 (1), an application may be made to a judge of the Supreme Court or the High Court, alleging, inter alia, that the shipowner is "probably liable to pay compensation" under the Act. An order may be made directing an officer of the Department of Customs and Excise to detain the ship if she is in any port or river or within any territorial waters of Australia. The detention will continue until the shipowner, agent or master thereof has either paid the compensation or given security, approved by the court, to abide the event of the proceedings brought by the claimant.<sup>99</sup> Although the detention procedure may be invoked by foreign seamen, the jurisdiction of the Supreme Court or the High Court is confined mainly to foreign ships. Compared with an admiralty action in rem which could give rise to damages for wrongful arrest, the detention procedure is by far a safer proposition. Moreover, the heavy expenses normally required in instituting admiralty actions are not incurred in application for detention orders. Among the State enactments, only the Western Australian legislation provides for the detention of a ship on similar grounds.<sup>1</sup>

The foregoing analysis has brought to light a number of gaps in the law. Many cases of injury and death suffered by seamen fall outside the scope of section 4 of the Seamen's Compensation Act 1911-73 (Comth.). The facts of McKenny v. State Government Insurance Office (Queensland)<sup>2</sup> show that a significant number of claims are not covered by State legislation. Moreover, as a matter of public policy, even where in respect of the injury or death of a seaman there is a right to statutory compensation, he or his spouse should have the alternative of being able to proceed under maritime law against the ship. One anomaly stands in the way. Where the personal injury or loss of life sustained is not "damage done by any ship" within the meaning of section 7 of the Admiralty Court Act 1861 (Imp.), Australian courts have no jurisdiction to entertain an action in rem. It is submitted that the law should be amended along the lines of section 20 (2) (f) of the Supreme Court Act 1981 (U.K.)<sup>3</sup> and also to allow claims for statutory compensation to be enforced by proceedings in rem against the ship.

99. Cf. Merchant Shipping Act 1894 (Imp.), s. 692; Workmen's Compensation Act 1906 (Edw. VII, c. 58) (U.K.), s. 11.

1. Act (No. 86 of 1981) (W.A.), s. 179.

2. (1972) Q.J.P.R. 138, supra.

3. Cap. 54; see Chapter Nine.

### III. CARGO LOSS OR DAMAGE

#### 1. Shipping Practice and Cargo Transportation

Apart from fishing and salvage vessels, most commercial vessels are employed in the carriage of goods and cargo in bulk. Although goods may still be shipped in conventional packages or cartons, container ships and tankships are fast replacing vessels of the older model. The high costs of maintaining and operating vessels, the fluctuating world economy and other factors have increased the pressure on shipowners to maximise the use of their ships.

Today it is common for ships to be employed in three different ways. Firstly, a shipowner may charter the entire vessel to a person or company as a large-scale importer. Under an F.O.B. contract made between an importer and an exporter, it is generally the former's obligation to provide or nominate a vessel at the port of loading.<sup>4</sup> When the goods are loaded on board the chartered vessel, bills of lading signed by the ship's master or agent are issued to the charterer. In the hands of the charterer, as shipper, the bills of lading merely serve as receipts of goods put on board by the shipowner. Unless otherwise stipulated, a bill of lading is by mercantile custom and statute a quasi-negotiable instrument. Subsequent dealings in the goods, e.g. a resale, usually occur. The charterer will transfer the bills of lading and assign his rights to a buyer as endorsee.<sup>5</sup> It is clear that a number of different contracts are involved. They are the charterparty made between the shipowner and the charterer as importer, and later the contracts of offfreightment which come into existence between the shipowner as carrier and the endorsees.<sup>6</sup>

Secondly, a shipowner may operate as a general carrier, e.g. in the liner trade, by accepting from a large number of shippers an infinite variety of goods for carriage. In respect of the goods shipped by

4. For position in Australia and Britain, see Trade Terms (1 C.C. Document No. 16) (1955 ed.), pp. 58-59; Incoterms (1980 ed.), p 36, paragraph 1.

5. Usury, Bills of Lading and Written Memorandum Act (N.S.W.) (No. 43 of 1902), s. 5; Factors Act 1892 (Qld.) (No. 56 Vic. No. 8), s. 7; Mercantile Act (S.A.) (No. 2285 of 1936), s. 14; Bills of Lading Act 1857 (Tas.) (20 Vic. No. 25), s. 3; Goods Act (Vic.) (No. 6265 of 1958), s. 74; Bills of Lading Act 1855 (Imp.) (18 & 19 Vic., c. 111), s. 3, as adopted by 1856 Act (W.A.) (20 Vic. No. 7).

6. Hague Rules, Article 1 (b); see Scrutton on Charterparties and Bills of Lading (19th ed. 1984), pp. 417-418.



each customer, a separate bill of lading is issued by the carrier.

Thirdly, a company may charter a vessel from her owner for a voyage or a specified period of time. It has become an increasingly common practice for a charterer to set up its business as a general carrier, issuing bills of lading in its name. The contracts of affreightment, as evidenced by the bills of lading, are individually made between the charterer as carrier and the shippers.

Official statistics show that between the years 1975 and 1976 the three types of shipping services accounted for the carriage of over seventy percent of the total Australian imports and exports.<sup>7</sup>

Inefficacy of personal action. In view of the inestimable value of ocean freight on which Australia's economy depends, it is vital to evaluate the protection afforded to cargo-owners. In many instances, personal actions to recover compensation for cargo loss or damage against shipowners or carriers can prove to be abortive or disappointing.<sup>8</sup> Goods from foreign countries may, by their laws, be required to be carried by their national vessels for export overseas, e.g. into Australia. The charterparties and contracts of affreightment are often made overseas and subject to foreign laws. They may provide that disputes or claims arising out of the contracts of carriage must be settled in a particular manner, e.g. by arbitration or in tribunals abroad.<sup>9</sup> Even in the absence of such "foreign jurisdiction" or "foreign tribunal" clause, a difficult hurdle may be encountered. If a shipowner or carrier has no office in this country, proceedings will have to be instituted overseas and possibly under a different legal system. Another grave risk inherent in personal actions is that the shipowner or carrier, whether local or overseas, against which judgment has been obtained may turn out to be an insolvent company.<sup>10</sup>

7. Overseas Cargo Shipping Legislation Report (1978 ed.), Dept. of Transport, A.G.P.S., Canberra, pp. 145-147.

8. Even though carriers are members of protection and indemnity clubs (P & I Clubs), the tendency is to reject or limit cargo claims. The object is to reduce the contributions which carriers have to pay to their respective clubs.

9. See e.g. The Cap Blanco [1913] P. 130, infra, where such a clause was incorporated in the bill of lading.

10. Unless, of course, the Companies Code, s. 447 (1), in force in each of the Australian States applies.

Often the number of agents involved, the possible use of the vessel by mortgagees after taking possession of her and the charterer's tendency to sublet the vessel to others complicate matters for prospective cargo claimants. The dilemmas confronting cargo interests in Australia and elsewhere cannot on a long-term basis be satisfactorily resolved by resorting to insurance. The reason is that, as against a shipowner or carrier, an insurer has no better right than an insured himself.<sup>11</sup> Hence where insurers are unable to reduce or recoup their loss by exercising their rights of subrogation the risks will be borne by cargo owners and consumers in terms of increased premiums.

## 2. Goods carried into Australia

A number of the problems which arise in personal actions may be overcome if admiralty proceedings in rem can be brought against the carrying vessel. Apart from certain exceptions, English and Australian laws on the subject are similar. One leading advantage is that, where the writ of summons has been issued though not yet served, the right of action in rem is unaffected by a change of ownership of the vessel.<sup>12</sup> Where admiralty jurisdiction is exercisable, generally the arrest and detention of the ship will often exert sufficient pressure on shipowners or carriers to compensate cargo owners. Otherwise the judgment obtained may be enforced by the sale of the ship. The proceeds of the sale will be applied to meet the claims.

We shall consider the situations where admiralty actions in rem may be instituted in State Supreme Courts and the High Court. Section 6 of the Admiralty Court Act 1861 (Imp.) reads:

"The High Court of Admiralty shall have Jurisdiction over any claim by the Owner or Consignee or Assignee of any Bill of Lading of any Goods carried into any Port in England or Wales in any Ship, for Damage done to the Goods or any part thereof by the Negligence or Misconduct of or for any Breach of Duty or Breach of Contract on the Part of the Owner, Master or Crew of the Ship, unless it is shown to the Satisfaction of the Court that at the time of the institution of the cause any Owner or Part Owner

11. Simpson v. Thomson (1877) 3 App. Cas. 279; Edwards (John) & Co. v. Motor Union Insurance Co. [1922] 2 K.B. 249.

12. The Monica S. [1967] 3 All E.R. 740, supra.

of the Ship is domiciled in England or Wales...."

By the proviso in section 2 (3) (a) of the Colonial Court of Admiralty Act 1890 (Imp.), the name of the British possession is to be substituted for the expression "England and Wales". For the purpose of the Act, the Commonwealth and each of the Australian States are British possessions. Harold Renfree has rightly pointed out the problems as follows: "[T]he jurisdiction does not extend to claims upon charter parties, nor does it extend to bills of lading except to a limited extent, nor to claims in tort in respect of goods carried in a ship except to a limited extent."<sup>13</sup> Charterers, who are not bill of lading holders and therefore without proprietary interest in the goods carried, are outside the ambit of the section.<sup>14</sup> They are not subject to any serious disadvantage which justify statutory intervention. More often than not, for non-fulfilment of a charterparty greater detriment is suffered by the shipowner than the charterer. The excess of tonnage in the world means that, as against shipowners, charterers are in a strong bargaining position.

However, the position of shippers and bill of lading holders calls for careful analysis. In the St. Cloud, Dr. Lushington aptly spoke of the general intention of the legislation in enacting section 6 in these terms:<sup>15</sup>

"The statute is remedial. The short delivery brought to this country in foreign ships or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for, the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal...With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the aggrieved party to arrest the ship in cases where...the common law tribunal could (not) afford an effectual redress."

To evaluate the remedy, the scope of the section needs to be ascertained. It applies to claims in respect of cargo damage or loss which

13. H. Renfree, Federal Judicial System of Australia (1984 ed.), p. 10, supra.

14. In The Yuri Maru, The Woron [1927] A.C. 906, p. 909 (Privy Council), Lord Merrivale states: "The jurisdiction in Admiralty of the High Court of Justice in England did not extend to claims upon charterparties at the time when the Colonial Courts of Admiralty Act, 1890, became law."

15. (1863) Br. & Lush. 4, 14; 167 E.R. 269, p. 275.

occurs mainly in foreign ships. The goods must be carried into an Australian port and none of the shipowners is domiciled in Australia. The words "carried into any port [in Australia]" are regrettably too restrictive in that the object of the legislature to provide a remedy against foreign ships is seriously defeated. The section has been held not to apply where goods are incidentally brought back to an Australian port by an outward-bound ship. In *F. Kanematsu and Company Ltd. v. The Ship "Shahzada"*,<sup>16</sup> a foreign ship loaded with 1,000 cattle hides was leaving Sydney for Kobe in Japan. While within the territorial limits of the port of Sydney, she collided with a British ship and sustained serious damage. After she was refloated, she returned for repairs at Sydney where a large portion of her cargo was discharged. A Japanese company, as bill of lading holders, instituted an admiralty action *in rem* against the ship. The High Court held that, as the ship had not proceeded beyond the territorial limits of the port, the goods were not carried into the port of Sydney within the meaning of section 6. Hence it had no jurisdiction. One agrees with the view of Taylor, J., that based on the wording, it is impossible to give the provision a liberal construction. He finds no justification for "holding that the expression 'goods carried into any port' includes goods carried out of that port or goods in the course of being carried out of that port."<sup>17</sup> It is probable that the unusual circumstances of such an occurrence did not enter into the contemplation of those who framed the section. The case of *The "Bahia"*,<sup>18</sup> which falls on the other side of the line, concerned the carriage into an English port of cargo consigned to a foreign port. A cargo of corn was carried on board the ship at New York under a bill of lading for delivery at Dunkirk in France. In consequence of an accident, the ship put into the English port of Ramsgate. The master refused to carry the cargo to Dunkirk or to allow its delivery at Ramsgate. To remedy the serious grievance caused to the plaintiffs, as bill of lading holders, Dr. Lushington commendably gave a wide interpretation to the section by

16. (1956) 30 A.L.J. 478.

17. *Ibid.*, p. 482.

18. (1863) 167 E.R. 298.

holding that it applied to the case. Thus for breach of a duty of care owed by the master, an action in rem can be brought against the ship.

New efforts were made by cargo claimants to extend the in rem remedy. In Co-operated Dried Fruit Sales Pty. Ltd. v. The Ship "Terukawa Maru",<sup>19</sup> unsuccessful attempts were made to widen the jurisdictional base of the High Court of Australia. The plaintiff, as bill of lading holder, sued for damages for the loss of goods shipped at Melbourne for delivery in Georgetown in Guiana. In the first submission, it was argued that, without reference to statutory authority, the High Court of Admiralty had the jurisdiction to hear and determine the action. Menzies, J., alluded to the conflict in early times between the judges of the High Court of Admiralty and those of the Common Law Courts in England.<sup>20</sup> The many prohibitions issued by the latter and the restrictive construction placed on the statutes had put an end to the admiralty jurisdiction of the Court of Admiralty with regard to cargo claims.<sup>21</sup> By the second submission, it was contended that under the County Courts Admiralty Jurisdiction Act 1868 (U.K.), as amended by the 1869 Act (U.K.),<sup>22</sup> the English county courts were empowered to adjudicate upon claims not exceeding £300, which arose out of contracts of carriage in any ship. By order made under section 6, 7 or 8 of the 1868 Act (U.K.), the Court of Admiralty could have obtained jurisdiction to hear and determine the claims. The judge rejected the plaintiff's argument that the case came within the two Acts (U.K.). It was held that the Acts did not empower the Court of Admiralty to adjudicate upon claims arising out of contracts

19. (1972) 46 A.L.J.R. 357.

20. Recounted and summarised in E.S. Roscoe, The Admiralty Jurisdiction and Practice of the High Court of Justice (5th ed. 1931), pp. 4, et. seq.

21. For statutes involved, see 13 Richard II stat. 1, c. 5; (1391) 15 Richard II, c. 2 and c. 3. In The "Ironsides" (1862) Lush. 458, 466, when construing Admiralty Court Act 1861 (Imp.), s. 6, Dr. Lushington said: "Antecedently to the passing of the statute, this Court could not have exercised any jurisdiction at all in a case of this kind. I do not say that it had not formerly such a jurisdiction, but it would not have ventured to exercise it."

22. 31 & 32 Vic., c. 71, as amended by 32 & 33 Vic., c. 51.

of carriage generally but only where "such claims have been commenced in the county court."<sup>23</sup> In the absence of clear wording to that effect, the reasoning of the learned judge is unconvincing. It is submitted that, where the Court of Admiralty was empowered by statute to order the transfer to it of certain claims from another court, the jurisdiction of the former is at least co-existent with, if not greater than, that of the latter.<sup>24</sup>

Judicial indifference to the needs of business communities and the unenlightened approach have added to the problem. To the dismay of Australian cargo interests, the outcome is not only retrogressive but detrimental to the country's economy. In the Rosenfield Hillas & Co. Pty. Ltd. v. The Ship Fort Laramie,<sup>25</sup> a large cargo of timber was allegedly loaded on board the ship at San Francisco for discharge at Melbourne. The plaintiff, as endorsee of two bills of lading, brought an action in rem against the ship for failure to deliver a portion of the timber and obtained judgment for £2,549 7s. 9d. Less than three months later, on the application of the defendant, the judgment was set aside. Evidence showed that the portion of timber not delivered at Melbourne had not been loaded. The bills of lading in question were signed by S, a managing owner of the ship Fort Laramie, stating a larger quantity of timber than that really put on board. Section 72 of the Goods Act 1915 (Vic.) read:<sup>26</sup>

"Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped shall be in all civil proceedings conclusive of such shipment against the master or other person signing the same notwithstanding that such goods or some part thereof were not so shipped."

Based on section 72 and the finding that the other co-owners of the ship had not authorised the signing and issue of the bills of lading, Knox, C.J., held that the quantity statements were not binding on them. Following the decision in Owners of S.S. Utopia v. Owners of

23. (1972) 46 A.L.J.R. 357, p. 357.

24. By Colonial Courts of Admiralty Act 1890 (Imp.), s. 2 (2) a Colonial Court of Admiralty may exercise, inter alia, "such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

25. (1922) 31 C.L.R. 56. On appeal, the decision of Knox, C.J., was reversed on factual but not on legal grounds: (1932) 32 C.L.R. 25.

26. These words were reproduced verbatim from s. 3 of the Bills of Lading Act 1855 (U.K.) (18 & 19 Vic., c. 111). For current provision, see Goods Act (Vic.) (No. 6265 of 1958), s. 74.

S.S. Primula - The Utopia,<sup>27</sup> the court held that the plaintiff was not entitled to recover. The principle which grossly undermined the rights of cargo claimants is this: an action in rem under section 6 of the Admiralty Court Act 1861 (Imp.) will not lie against a ship unless there is the right of action in personam against possibly all the shipowners. With respect to his Honour Knox, C.J., the decision was unsatisfactory in a number of respects. No consideration was given to the extent or nature of S's interests in the ship. It was possible that the other owners were merely minority shareholders. It is contended that to avoid unjust results liability of the person holding majority shares or interests in the ship should suffice.<sup>28</sup> Apparently, in holding that there must be a breach of duty or contract on the part of the ship-owners instead of "the owner, master or crew of the ship" as provided in section 6, there is failure to give effect to the clear intention of the legislature. It had been established by a statute of George IV that a British ship may be owned by thirty-two persons.<sup>29</sup> Moreover, the reasoning applied by His Honour that S, being a managing owner himself, had no authority from the other owners to issue the bills of lading, may produce uncertainty in international trade. As a policy matter, the decision will open the door for shipowners to commit fraud on innocent third parties.

Another setback to the exercise of admiralty jurisdiction in rem comes from the use of a "foreign forum and law" clause. By accepting bills of lading containing such a provision, unwary Australian importers may be deprived of the valuable right conferred by section 6. The facts of The Cap Blanco<sup>30</sup> illustrate the effect of such a clause upon the operation of the Admiralty Court Act 1861 (Imp.). Ten cases of gold coins were shipped at Hambury on board the German

27. [1893] A.C. 492, p. 499. The principle laid down is that in the absence of negligence on the part of the owners and their servants no maritime lien will arise.

28. Cf. Professor Ivamy, Payne's Carriage of Goods by Sea (8th ed. 1968), pp. 42-43. It is submitted that the proposition should not apply to a situation where a bill of lading is signed and issued by the co-owner of a ship.

29. (1823) 4 Geo., c. 41, s. 31. This number has remained unchanged under the English Merchant Shipping Act 1894 (Imp.), s. 5 (1). Under s. 11 (1) (b) of the Shipping Registration Act 1981 (Comth.), the maximum number is 64.

30. [1913] P. 130.

vessel Cap Blanco. They were to be delivered on the order of the plaintiffs, as bill of lading holders, at Monte Video or Buenos Aires. Under the bill of lading, the shipowners as carriers were empowered to call at any place for discharging and loading goods and to tranship, or reload the merchandise by one of their ships. Also all the vessels had the right to touch once or several times at any places in any sequence. Clause 14 provided that "any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law." At Monte Video, only nine of the cases were delivered. On her return voyage to Hamburg, with the reportedly missing case of coins still on board, she put into Southampton. She was arrested on behalf of the plaintiffs in an action for breach of the contract of carriage or of a duty of care in respect of the missing case. The defendants objected to the English Court's exercise of the jurisdiction. Although the court was invested with the jurisdiction, an order was made to stay the proceedings. Sir Samuel Evans, the English Court of Appeal President, lucidly explained the judicial attitude to clause 14 as follows:<sup>31</sup>

"[It] is to be treated as a submission to arbitration within the meaning of s. 4 of the Arbitration Act, 1889. The tribunal at Hamburg is not specified, but a fair business-like reading of the contract means that such disputes are to be tried by the competent Court, and in accordance with German law...In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties...and it is right to hold the plaintiffs to their part of the agreement."

The above analysis of the authorities shows the various difficulties that stand in the way of cargo claimants. So long as the 1861 Act (Imp.) operates as part of Australian admiralty law, much disservice and harm are being caused to Australia's import trade.

However, a contribution of significance to the subject of

31. Ibid., pp. 135-136. In Australia, once a submission to arbitration is made in writing, the parties are bound by it and cannot institute proceedings to override it; see Arbitration Act 1902 (N.S.W.), s. 6; Arbitration Act 1973 (Qld.), s. 10 (1); Arbitration Act 1881-1974 (S.A.), s. 3; Arbitration Act 1892 (Tas.), s. 6; Arbitration Act 1958 (Vic.), s. 5; Arbitration Act 1895-1970 (W.A.), s. 6.



cargo-interest protection has come from the Lord President's judgment. His explicit re-statement of the established proposition and apparently legislative policy should be firmly adhered to as the bulwark against adventurisms. After referring to the long-standing cases, he said:<sup>32</sup>

"The result of the authorities is that s. 6 of the Act was intentionally framed in large and general terms and ought to be construed with as great latitude as possible within the fair meaning of the words, on the ground that 'the statute, being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow'."<sup>33</sup>

He held that in order to found jurisdiction under the Act it was totally unnecessary that the goods should be carried into an English port for the purpose of delivery. It is arguable that his pronouncement has given Australian courts a wider jurisdiction. Thus admiralty proceedings in rem should lie against foreign ships where goods are "carried into" any Australian ports by reason of casual or fortuitous circumstances or for transshipment purposes.

Another limitation on the in rem remedy should not be overlooked. In so far as section 6 can only operate where the action is based on a bill of lading, the nature of this document merits consideration. It is remarkable that such a vital instrument of international trade is not defined in the Bills of Lading Act 1855 (U.K.) and any of the Australian State Acts. In established shipping practice, when all the goods have been put on board the ship, a "shipped" bill of lading signed by the ship's master or agent will be issued. This document is clearly within the ambit of English and Australian legislation.<sup>34</sup> However, it is questionable whether the holder of a "received-for-shipment" bill of lading can similarly invoke section 6 of the 1861 Act (Imp.).

32. [1913] P. 130, p. 134. The general scope and object of the 1861 Act were described by Dr. Lushington in The St. Cloud (1863) Br. & L. 4 and The "Bahia" (1863) Br. & L. 61.

33. The Pieve Superiore (1874) L.R. 5 P.C. 482, p. 492.

34. Bills of Lading Act 1855 (U.K.), ss. 1 and 3; Usury, Bills of Lading and Memorandum Act 1902 (N.S.W.), s. 5; Factors Act 1892 (Qld.), ss. 5 and 7; Mercantile Act 1936 (S.A.), ss. 14 and 15; Bills of Lading Act 1857 (Tas.), ss. 1 and 3; Goods Act 1958 (Vic.), ss. 74 and 75; 1856 Act (W.A.) giving effect to the Bills of Lading Act 1855 (U.K.). In Incoterms (1980 ed.) op. cit., p. 12, the term "bill of lading" is defined as a "shipped bill of lading issued by or on behalf of the carrier."

A distinction between the two types of document was made in Diamond Alkali Export Corporation v. Bourgeois.<sup>35</sup> McCardie, J., considered that a "received-for-shipment" bill of lading in the hands of an assignee does not constitute conclusive evidence of the shipment of the goods referred to therein. He is therefore unable to take advantage of section 3 of the Bills of Lading Act 1855 (U.K.).

In Alex. Cowan & Sons, Ltd. and Others v. The "Ship Malborough Hill",<sup>36</sup> several consignees or endorsees of "received for shipment" bills of lading jointly issued a writ out of the Supreme Court of New South Wales and had the ship arrested. The plaintiffs admitted that they did not know whether the goods were shipped in the "Malborough Hill" and lost on the voyage, transhipped during the voyage and lost, or never shipped at all. In keeping with the expansionist policy, the Full Court of the Supreme Court construed the words in section 6 to mean "carried or to be carried". In affirming the judgment, the Privy Council held that the "received-for-shipment" bills of lading were within the meaning of section 6.<sup>37</sup>

In his article "Shipping Law Revision", Professor Hardy Ivamy says:<sup>38</sup>

"...when the [Bill of Lading] Act of 1855 was passed, the practice of using 'through bills of lading' covering transit by law and sea had not yet arisen. It would appear that no consignee named in such a bill can claim the protection of the Act. This seems a serious disadvantage under the present law."

His view is equally true in respect of the position of Australian importers. The term "bill of lading" is expressly used in section 6 of the Admiralty Court Act 1861 (Imp.) and also in the bill of lading legislation of each of the Australian States.<sup>39</sup> Accordingly, the problem will arise in relation to combined transport documents, e.g. those issued under the T.C.M. Convention,<sup>40</sup> and to receipts issued subject

35. [1921] 3 K.B. 443, pp. 450, 452.

36. (1919) 19 S.R. (N.S.W.) 306. It was held that the Court had jurisdiction under s. 6 to hear the case.

37. [1921] 1 A.C. 444.

38. (1959) 10 C.L.P. 185, p. 186. For bill of lading and non-negotiable receipt, see William Tetley, Marine Cargo Claims, op.cit., pp. 5-9.

39. For the Act in each State, see footnotes above.

40. As to definition, see Article 1 rule 2 of the draft convention C.F.C. IV/18/Rev. 1; TRANS/374/Rev. 1; 24th Jan. 1972.

to the special conditions under Article VI of the Hague Rules.

### 3. International Conventions - The Rules

National Legislation. The law of contract has generally permitted the parties concerned to make their own bargains.<sup>41</sup> In contracts of carriage of goods by sea, the "freedom of contract" principle had been abused. By reason of their predominant position, ship-owners and carriers were generally able to provide services on their own terms. The laissez faire system, the unequal positions of the carrier and shipper and the policy of common law gave rise to a problem which threatened the foundations of maritime commerce.

Starting from the second half of the nineteenth century, carriers began introducing new and more wide-ranging exclusion clauses into bills of lading.<sup>42</sup> Such clauses were extensively used to exonerate from liability the shipowner and the carrier, and also the carrying vessel. Towards the end of the nineteenth century, shippers, cargo consignees and marine underwriters were so uncertain about the legal implications of the infinite variety of terms and clauses used that government intervention became necessary. Unless scrupulous care was exercised, importers under F.O.B. and C.I.F. contracts could be buying worthless scraps of paper or expensive lawsuits.

The United States took the lead by passing the Harter Act 1893<sup>43</sup> which achieved several objectives. It applied to contracts of

41. "In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I find no trace of it." Suisse Atlantique S.A.M.S.N. v. Rotterdamsche K.C. [1967] 2 All E.R. 61, p. 67, per Viscount Dilhorne.

42. For example, carriers sought to exonerate themselves from liability for cargo damage or loss due to: "any circumstances whatsoever" (Taubman v. Pacific S.N. Co. (1872) 26 L.T. 704); "leakage and damage"; (Czech v. General S.N. Co. (1867) L.R. 3 C.P. 14); "dangers and accidents of the sea" (Hamilton, Fraser & Co. v. Pandorf (1887) 12 A.C. 518); "any act, negligence, default, or error in the judgment of the pilot, master, mariner, or other servants of the shipowners in navigating the ship or otherwise" (Baerselman v. Bailey [1895] 2 Q.B. 301), etc.

43. 46 U.S. Code, ss. 190-196; came into force on 2nd July, 1893. It was the forerunner of the early Sea-Carriage of Goods Act 1904 (Comth.).

of carriage of merchandise or property from or between ports of the United States and foreign ports.<sup>44</sup> All stipulations in bills of lading that relieved the owner, master, agent or manager of the ship from liability for cargo loss or damage due to failure to exercise cargo care or due diligence to make the ship seaworthy were rendered unlawful.<sup>45</sup> Thus under contracts of carriage subject to the Act (U.S.) shippers and bill of lading holders were able to exercise important rights against the owner, master, agent or manager of the ship. Where a shipowner failed to exercise due diligence to make the ship seaworthy in all respects and cargo loss or damage was sustained, admiralty action in rem could be instituted against the vessel.<sup>46</sup> Moreover, for violation of any provisions of the Act (U.S.), the fine and costs imposed would give rise to a lien on the vessel.<sup>47</sup>

The Hague Rules. Towards the inception of the twentieth century maritime trade became recognised by increasingly more industrialised and developing countries as a major source of wealth. A prerequisite to the achievement of their goals was the establishment of an international regime to promote certainty in shipping trade and uniformity in the law relating to contracts of carriage. This was done at the International Conference on Maritime Law held at Brussels in October, 1923. It amended and adopted the International Convention for the Unification of certain Rules of Law relating to Bills of Lading (the "Hague Rules"). By the year 1975, over eighty countries around the world had ratified and acceded to the Convention.<sup>48</sup> In 1924, Britain and Australia passed legislation to give effect to it.<sup>49</sup>

Our chief concern here is whether, aside from the rights of a bill of lading holder to obtain compensation from the carrier in a personal action, the former is able to proceed against the shipowner and the carrying vessel. Bills of lading issued for the carriage of

44. Ibid., s. 1.

45. Ibid., s. 2.

46. Ibid., s. 3.

47. Ibid., s. 5.

48. See William Tetley, Marine Cargo Claims, op. cit. pp. 487-489.

49. The Carriage of Goods Act 1924 (U.K.) was repealed. The Carriage of Goods by Sea Act 1924 (U.K.) (c. 19) gives effect to the Hague Rules, as amended by the Brussels Protocol 1968 (or the Visby Rules). The Brussels Protocol 1968 has not been given effect in Australia. See Sea-Carriage of Goods Act 1924-73 (Comth.).

goods by foreign ships into Australia are usually subject to the Hague Rules. The matters under consideration are directly relevant when Australian importers contemplate instituting actions in rem under the Admiralty Court Act 1861 (Imp.).

An interesting Australian case in point is J. Gadsden Pty. and Another v. Australian Coastal Shipping Commission.<sup>50</sup> A cargo of tinplate was carried on board a ship belonging to the Australian Shipping Commission from Port Kembla (N.S.W.) to Kwinana (W.A.). The bills of lading issued by B.H.P., the charterer, who operated as carrier, were subject to the Sea-Carriage of Goods Act 1924-1973 (Comth.). They were not signed on behalf of the ship or the shipowner. Due to the entry of water into the hold, rust damage was caused to the tinplate. Under the contract of carriage subject to the Commonwealth Act incorporating the Hague Rules, the two parties involved were the carrier and the bill of lading holders, as consignees. As the cargo damage occurred more than a year ago and no writ of summons had been issued, the rights of the consignees against the carrier under the Hague Rules were therefore extinguished. Rule 6 of Article III of the Hague Rules, inter alia, reads:

"In any event the carrier and the ship shall be discharged from all liability unless it [the action] is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The plaintiff consignees, however, sued the shipowner on the basis of bailment and also in tort.

In the trial court, Sheppard, J., rejected the defences of the shipowner who relied on rule 6 of Article III, and gave judgment for the consignees. The appeal against the judgment was unanimously dismissed. One cannot but applaud the learned Appeal Judges, Moffit and Samuels, for the sound reasoning and construction applied to the Hague Rules. They have shed new light in a number of respects on the rights of shippers and bill of lading holders.

Firstly, it was held that the shipowner, not being a party to the contract of carriage, was not entitled to rely on rule 6 of Article III. Although Article I defines "Carrier" to include "the owner",

50. (1977) 31 F.L.R. 157.

the shipowner can only be brought within the rules if he is a party to the contract covered by a bill of lading. Otherwise the rules, e.g. rule 6 of Article III and rule 1 of Article IV, which provide for discharge from liability, will not extend to a person who is sued for liability in tort arising outside the contract.

The omission to include the shipowner by name in the definition of "carrier" or failure to issue the bill of lading on behalf of the shipowner proved to be a windfall for the consignees.<sup>51</sup> Although the case report makes no mention of this matter, they were fortunate in another respect. If the ship had been on charter by demise to B.H.P., it is submitted that the position would have been different. By the law of carriage of goods, B.H.P. as demise charterer would be the employer of the crew on board and have possession of the ship and the goods put on board. Since in such circumstances, the shipowner is not placed under any duty of care with respect to the cargo shipped, he cannot be held liable to the consignees.

Second, according to Samuels, J.A., the use of "carrier" and "ship" in rule 6 of Article III, rule 2 of Article IV and Article VII was designed to distinguish the liability of the carrier from that of the ship. One can certainly agree with his well-reasoned proposition as regards the alternative subject of liability under the Hague Rules. The vessel used for the carriage of goods can itself, in an admiralty action in rem, be held liable or responsible for the cargo loss or damage. His view certainly offers great potential for cargo claimants. Moreover, if the Hague Rules were held to confer on courts admiralty jurisdiction over ships, proceedings in rem could be instituted against the carrying ship without reference to the Admiralty Court Act 1861 (Imp.).

Third, the word "ship" in rule 6 of Article III is not held to include the owners and those interested in her. By giving a restricted

51. Generally, the charterparty provides that the charterer is bound to indemnify the shipowner for any liability incurred towards bill of lading holders beyond that expressly stated in the charterparty. See, e.g. paragraphs 7 and 9 of "Baltimex 1939", as amended in 1974.

meaning to the word, the court is really relegating all such persons to the position of strangers to the contract of carriage. The significance of the decision lies in enhancing the number of persons who 52 may be held liable as well as the remedies available to cargo interests.

On the other hand, a bill of lading can be signed by the ship's master and issued on behalf of the shipowner, thus making the latter a party to the contract of carriage. For cargo loss or damage, or delay in delivery, a claimant under the Hague Rules may proceed in a personal action against the carrier or, where appropriate, institute an action in rem against the vessel.<sup>53</sup> This principle of liability of the carrier and the ship is subject to three defences. Rule 6 of Article III has already been considered. Where a carrier or vessel is proceeded against for loss, damage or delay in delivery due to the ship's unseaworthiness, it is a defence that the due diligence required under rule 1 of Article III has been exercised. Lastly, by rule 2 of Article IV, "Neither the carrier nor the ship shall be responsible for loss or damage," resulting from one or more of the causes in paragraphs (a) to (q).

The Hamburg Rules. Developments in shipping and trade practices during the last two decades have rendered the Hague Rules inadequate in many ways. The Brussels Protocol 1968 was an interim measure to upgrade the Hague Rules for the purpose of dealing with some of the problems. However, apart from the fact that in 1978 only ten countries had ratified or acceded to the Protocol,<sup>54</sup> its benefit to cargo interests in terms of extending the right of instituting admiralty action in rem is doubtful. Paragraph (e) of Article II disentitles the carrier and the ship from the right to limit liability where the damage is caused intentionally, or recklessly and knowingly.

52. It also means that the defences and limitation of liability under the Hague Rules will not avail them.

53. J. Gadsden Pty. and Another v. Australian Coastal Shipping Commission (1977) 31 F.L.R. 157, p. 162.

54. Or the Visby Rules which came into force on 23rd July, 1977: William Tetley, Marine Cargo Claims, op. cit., p. 498.

Under rule 4 of Article III, a similar disentitlement applies to carrier's servants. The effect of these provisions is to increase the compensation recoverable against the ship or the carrier rather than to extend the right of proceeding in rem. At the Conference convened in Hamburg, the United Nations Convention on the Carriage of Goods by Sea was signed on 31st March, 1978.<sup>55</sup> It is known as the Hamburg Rules.<sup>56</sup> When ratified by the requisite number of States and given effect as municipal laws, they will replace the Hague Rules.

The Hamburg Rules are intended to apply to all contracts of carriage by sea between two different States if any of the criteria in paragraphs(a) to (e) of Article II rule 1 is met. Their wide-ranging mandatory application will ensure international uniformity in the law relating to bills of lading. It is the common understanding adopted at the United Nations Conference that the liability of the carrier under the Hamburg Rules is based on the principle of presumed fault or neglect. Except in certain cases modified by the provisions of the Rules, the general rule is that the burden of rebutting the presumption rests on the carrier.

It is thought that the presumption of fault or neglect based on cargo loss or damage, or delay in delivery will facilitate in rem proceedings being brought against the ship. The United States delegation had rightly foreshadowed that "omission of a provision for some sort of in rem jurisdiction was a fatal defect which would create great difficulties in the United States and render any eventual adherence to the new convention very uncertain...."<sup>57</sup> Another serious pitfall to be avoided was to prevent carrier interests from introducing into the Convention provisions which would considerably disadvantage

55. United Nations Commission on International Trade Law Yearbook, Vol. IX: 1978, p. 212.

56. See K. Grönfors, "The Hamburg Rules - Failure or Success" (1978) J.B.L. 334.

57. Joseph Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)", (1975) 7 (No. 1) J.M.L.C., p. 96.



cargo interests as to forum selection. Eventually a compromise in rem provision was preserved in paragraph 2 (a) of Article 21. This reads:

"Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with the applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action."

The benefits to cargo interests of the first part of the paragraph depend on the admiralty jurisdiction exercisable by the courts of a Contracting State. As has been noted, the position in Australia is governed by section 6 of the Admiralty Court Act 1861 (Imp.). In respect of outward-bound goods shipped under bills of lading, it may be thought that cargo claimants can choose a forum in one of the Contracting States where the national law permits proceedings in rem to be brought against the carrying vessel or her sister ship. It is common knowledge that governments, public authorities, harbour boards and private persons can, in certain circumstances, under existing domestic laws and regulations arrest or detain ships. However, paragraph 2 (a) does not extend such a right under the domestic laws of a Contracting State to cargo claimants. The wording of the first part of the paragraph suggests that the arrest of a ship - whether it be the carrying or the sister ship - must be in accordance with the "law of that State and ... international law." This expression is not defined in the Hamburg Rules. The submission is that it refers to a State's legislation or municipal law giving effect to the International Convention relating to the Arrest of Seagoing Ships 1952.<sup>58</sup> As paragraph 2 (a) speaks of the arrest of "the carrying vessel or any other vessel of the same

58. For text of this Convention, see Register of Conventions and Other Instruments concerning International Trade Law, United Nations (1973), vol. I, pp. 156-163. Australia is not listed as a signatory.

ownership," the 1952 Arrest Convention is meant.<sup>59</sup> If this view is correct, the in-rem process in paragraph 2 (a) will only avail cargo claimants where the Contracting State has adopted the 1952 Arrest Convention and given effect to it as part of its national laws.

An underlying object of paragraph 2 (a) is to enable cargo claimants to obtain sufficient security from a shipowner as a condition for the release of the arrested ship. On meeting this requirement, the defendant is entitled to have the action removed, at his choice, to one of the jurisdictions provided for in paragraph 1 of Article 21.

#### IV. NECESSARIES AND SERVICES TO SHIPS

It is proposed to consider the position of creditors who have provided necessities and services to ships.

##### 1. Necessitous Circumstances

It has been observed that part of Britain's policy was to maintain and expand her merchant fleet. Wherever possible overseas financial resources and trade credits were utilised. An aspect of this policy is the long-recognised authority of a master, when faced with an emergency in a foreign port, to obtain the supply of necessities and services on account of the shipowners and the ship. Since the first half of the nineteenth century, a number of factors have combined to boost the demands on material men and ship repairers in the Empire. At common law, shipowners were under an absolute warranty as to the seaworthiness of the ship at the commencement of the voyage and also at the commencement of each stage thereof.<sup>60</sup> Later, by the Merchant Shipping Act 1876 (Imp.), the obligation as to the ship's seaworthiness was imported into every employment contract made between shipowners and seamen.<sup>61</sup> This undertaking - as noted previously - has been re-enacted in the Navigation Act 1912-73 (Comth.).<sup>62</sup> The

59. See para. 1 of Article III. The provisions of this Convention have not been given the force of law in Australia.

60. Carver's Carriage of Goods (12th ed. 1971), vol. 1, paras. 107; 115-116.

61. 39 & 40 Vic., c. 80, s. 5.

62. Section 59, supra.

power exercisable by certain authorities or persons to detain ships for non-compliance with statutory requirements often prompted ship-owners and masters to obtain adequate supplies to, and the necessary repairs done on, their ships. In Australia, besides the list of safety requirements to be met under the Navigation Act (Comth.), there are further conditions to be observed under other legislation. Many of the safety measures are the outcome of international conventions.<sup>63</sup> They usually extend to ships of all countries which are signatories to the conventions. Moreover, shipowners and carriers will suffer substantial loss of freight if their ships are ill-equipped or not cargo-worthy. Naturally importers, trade financiers and marine underwriters will steer clear of transactions involving the carriage of goods by such ships.

It is interesting to note how the expanding demands for the provision of necessities and services to ships on credit have shaped the development of maritime law. It is probable that foreign States whose legal systems were founded on civil law tradition had long imposed a maritime lien on the ship for necessities supplied.<sup>64</sup> In Britain, however, the lien would only exist if a bottomry bond had been properly given.<sup>65</sup> The validity of the bond depended on the absolute necessity of the case. Dr. Lushington in The Trident<sup>66</sup> defined the situation as follows: "Where the master is in such a condition that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship."

63. E.g. Convention on the International Regulations for preventing Collisions at Sea 1972; International Convention for the Safety of Life at Sea, 1974 and the 1978 Protocol; and International Convention on Tonnage Measurement of Ships 1969 — scheduled to Navigation Amendment Act 1979 (Comth.), Part III.

64. See C. & C.J. Northcote v. The Owners of the Henrich Bjorn (1886) 11 App. Cas. 270, p. 274 (House of Lords), where counsel for appellants referred to Abbott on Shipping (5th ed.), pp. 108, 109.

65. It confers on the person advancing money a maritime lien on the ship, freight and cargo: The Onward (1873) 42 L.J. Adm., p. 70. As to bond respondentia, see the cargo ex. Sultan (1859) Swab. 504, 510; infra.

66. (1839) 1 W. Rob. 29, 31.

It is possible that in many instances masters were either unwilling to hypothecate their ships or the bottomry bonds executed were invalid. One undesirable consequence was that material men and ship repairers were placed in a less advantageous position under English law than under the civil law. In the absence of a bottomry bond, under English law creditors who had provided materials and services to ships could only enforce their claims by personal action. Such defects in the law were a grave setback to Britain's shipping policy and the growth of her ship-repair and other related industries. In the early part of the nineteenth century, English and foreign creditors began to institute proceedings in civil law courts in order to secure better remedies.

## 2. Dilemmas of Creditors

It is crystal clear that English maritime law was deficient. Even though personal actions could be instituted in England, they might not yield satisfaction as the shipowners might be insolvent. The frequent involvement of agents and charterers made it difficult to determine the identity, the credit-worthiness and the whereabouts of foreign shipowners.

John Mansfield in his learned article said:<sup>67</sup>

"Although it is clear that the Court of Admiralty prior to 1840 exercised...no jurisdiction over claims for necessities supplied, as is usually the case, on the land, whether in this country or abroad: it is by no means clear that the court would have refused to entertain a suit for necessities supplied on the high seas, if any such case could be supposed to arise under circumstances not amounting to a salvage service. Nor is it all clear how such a jurisdiction, if exercised, could have been prohibited, seeing that it would not have been obnoxious to the statutes of Richard II."

In the light of what Mansfield said, it is vital to enquire whether the Court of Admiralty exercised jurisdiction in rem in claims for necessities supplied, and, if it did, whether it was lawfully assumed. Fortunately, we have from the Privy Council case of The "Two Ellens"<sup>68</sup>

67. (1888) 4 L.Q.R. 379, p. 384. His view is based on the writings of Edward Coke in 6 Rep. Admiralty, Part XII, p. 79, and on Comyn's Digest in Title Admiralty, E. 19, 1793 ed.

68. Donald Johnson v. John Alexander Black (The "Two Ellens") (1872) L.R. 4 P.C. 161.

authoritative statements that answer both questions. In delivering the judgment, Mellish, L.J., pointed out in these words:<sup>69</sup>

"It is clear that, previous to the passing of the 3 & 4 Vict. c. 65 [i.e. the Admiralty Act 1840] the Court of Admiralty had no jurisdiction in the case of necessities supplied to a ship...It is perfectly true that for many years prior to the time of Charles II, the Court of Admiralty had claimed, and to a considerable extent exercised, such a jurisdiction; but the Courts of Common Law in the time of Charles II, and subsequently, had prohibited them from exercising that jurisdiction on the ground that they never possessed it."

Despite the Court of Admiralty's assumption of the jurisdiction for many years, the Privy Council held categorily, as it had done previously in The Neptune,<sup>70</sup> that the Court of Admiralty never had, by the law of England, such competence.<sup>71</sup> Moreover, in the absence of express statutory provision, the inherent jurisdiction would not authorise the Court of Admiralty to entertain in rem suits for necessities supplied.<sup>72</sup>

Closely related to the supply of necessities is the provision of towage services which are of recent origin. There are two conflicting views. According to William and Bruce, the right to proceed against the ship for towage services rendered was not created by statute but had existed before with no maritime lien.<sup>73</sup> Without definite authorities on the matter, one can only surmise that, if William and Bruce were correct,<sup>74</sup> the remedies granted by the Court of Admiralty were beyond its competence. One remote possibility, which cannot be entirely ruled out, is this. Under its ancient jurisdiction, a plaintiff could enforce his claim in personam, without the res being affected, where the towage services were rendered on the high seas.<sup>75</sup>

### 3. Imperial Reforms affecting Australia

Despite the bitter opposition of common law judges in the past,

69. Ibid., p. 166.

70. 1 Knapp's P.C. Cases 94.

71. (1872) L.R. 4 P.C. 161, pp. 166-167.

72. As to matters dealt with in the exercise of inherent jurisdiction, see Chapter Nine.

73. See The Henrich Bjorn (1886) 11 App. Cas. 270, p. 283 (P.C.) where Lord Bramwell referred to Williams & Bruce, Admiralty Practice, p. 152.

74. Apparently, the case of The Isabell, 3 Hagg. 427, concerning simple towage came before Sir John Nicholl in 1838.

75. The Henrich Bjorn (1886) 11 App. Cas. 270, p. 283, per Lord Bramwell.

steps were taken to restore to the High Court of Admiralty part of its ancient role. By widening the admiralty jurisdiction and reforming the maritime law, Britain was able to capture her share of the lucrative litigation involving foreign ships, and promote her national ship-supply and ship-repair industries.

Under the 1840 Act (Imp.),<sup>76</sup> passed as the first phase of the reforms, the Court was empowered, inter alia, to decide all claims and demands "for necessities supplied to any foreign or sea-going vessel and to enforce payment thereof...." The section applied whether the necessities were supplied to a foreign ship when she was within the body of an English county or upon the high seas. Dr. Lushington was renowned for his far-sighted judgments. These so supplemented the existing law as to further the shipping interests and policy of Britain. Apparently his goal that the Court of Admiralty should be able to compete on equal terms with its foreign civil law counterparts prompted him to grant a new remedy. Thus in The West Friestland,<sup>77</sup> decided in 1859, and in The Ella A Clark,<sup>78</sup> decided in 1863, he held that by reason of section 6 of the 1840 Act (Imp.) the plaintiffs who supplied necessities to a foreign ship in an English port had a maritime lien. These authorities and others which applied the proposition had left their imprint on English law. As recent as 1957, an Australian Supreme Court judge remarked:<sup>79</sup> "I think it is still open to argument, in jurisdictions bound by decisions of the Privy Council, that section 6 of the 1840 Act conferred a maritime lien on material men."

Another significant thrust was made to strengthen the jurisdiction of the Court of Admiralty. It started with the distinction drawn between a foreign port and other places. Dr. Lushington said:<sup>80</sup>

76. 3 & 4 Vic., c. 65, s. 6.

77. Swab. 454.

78. Br. & L. 32.

79. Dalgety and Co. Ltd. v. Aitchison; The "Rose Pearl" [1957] 2 F.L.R. 219, p. 226, per Kriewaldt, J., who analysed the authorities.

80. The India 32 L.J. (Ad.) 185, p. 187. Dr. Lushington's view was cited with approval by A.L. Smith, L.J., in The Mecca [1895] P. 95, p. 112 (C.A.).

"I think it is impossible to maintain that the words 'in the body of a county, or upon the high seas' involve necessities supplied in a foreign port; nor do I see any expression from which I could infer that a foreign port was included."

The in rem process availed creditors who sought to enforce payment for necessities supplied to foreign ships anywhere on the high seas except in foreign ports. It had the far-reaching object of diverting English and foreign merchants, who had provided such necessities, from instituting actions in civil law courts. A valuable negative aspect was to deprive the ship chandlers and repairers in foreign ports of the statutory remedy. Consistent with the pre-conceived objectives, Dr. Lushington held in The Wataga<sup>81</sup> that section 6 of the 1840 Act (Imp.) conferred Admiralty jurisdiction over a claim for necessities supplied to a foreign ship in a colonial port. Later, the words "high seas" were held to include foreign ports which were not located in any artificial basins or docks excavated out of the land. This was an attempt by the Court of Admiralty to draw more overseas-based merchants to enforce their claims in England. It is interesting to note that the amalgamation of the various courts in England under the Supreme Court of Judicature Acts 1873 (U.K.)<sup>82</sup> did not prevent the judges from continuing to extend the admiralty jurisdiction. This trend is shown in the judgment of the English Court of Appeal in The Mecca, decided in 1894. Lindley, L.J., said:<sup>83</sup>

"...on general principles of law, I should arrive at the conclusion that, in this case, the Court of Admiralty had under the Act of 1840, jurisdiction to proceed against the Mecca when in this country for the coals supplied to her in Alexandria and Algiers, she being supplied on the high seas at those places, although they are also ports."

Further impetus to the growth of the jurisdiction of the High Court of Admiralty came from legislation. The authorities discussed above and the provisions of the Imperial Admiralty Court Acts, 1840 and 1861, underlie the development of Australian maritime law on the subject.

Section 4 of 1861 Act (Imp.). Where "the ship or proceeds thereof are under arrest of the Court," claims for the building, equipping

81. (1856) Sw. 165; 166 E.R. 1075; followed in Dalgety and Co. Ltd. v. Aitchison; The "Rose Pearl" [1957] 2 F.L.R. 219, p. 225.

82. 36 & 37 Vic., c. 66. This Act, as subsequently amended, came into force on 1st November, 1875.

83 [1895] P. 95, p. 108. A.L. Smith, L.J., went even further: p. 116.

and repairing of the ship would give rise to actions in rem. Since different conditions must be satisfied in relation to sections 4 and 5, the nature of the work done on, or services rendered to, a ship has to be distinguished. The enlightening case of Lewmarine Pty. Ltd. v. The Ship "Kaptayanni"<sup>84</sup> dealing with section 4 came before the Supreme Court of Victoria. In the admiralty action in rem, the plaintiff company, carrying on business as ship chandlers and repairers at Geelong, claimed the sum of over \$25,000. This debt was incurred for the supply to the ship of a rotary pump, some turnbuckles and fifty nuts and bolts, and in respect of a ship-cleaning operation to render her holds fit to carry a cargo of grain. The learned judge Pape rejected the plaintiff's argument that the claim was for the repairing of the ship. In his view, the cleaning operation and the use of turnbuckles to hold down the feeder hatches in the ship's decks were not repairs. He said:<sup>85</sup>

"I am disposed to think that all of these works may be said to constitute equipping of the ship - they were operations necessary to be undertaken to make the ship fit to carry out the primary purpose for which she was at the port of Geelong, namely to load a cargo of wheat and carry it to Alexandria, and when they were completed and not before was she equipped to undertake the carriage of the cargo."

The criterion adopted by Pape, J., is a practical solution, but imprecise in that the meaning of "equipping" in each case is determined by the purpose for which the items and services are required. Little difficulty is encountered where a specific voyage under fairly predictable weather and marine conditions involving the shipment of a known commodity is concerned. It is questionable whether the criterion could apply if the items and services are provided to enable the ship meet the obligations of her owner under a six-month charterparty. If a passenger ship is later converted for use as a cargo ship, it is doubtful whether all the works previously done on her could be collectively described as equipping. Under the new Admiralty

84. [1974] V.R. 465.

85. Ibid., p. 471.



Act (Comth.) to be enacted, Australia should pursue similar goals as the United Kingdom. As part of Australia's shipping policy, the courts here should give to the words of section 4, i.e. "building equipment and repairing", a wide meaning that is commonly understood by shipbuilders, chandlers and repairers in their trades.

According to Roscoe,<sup>86</sup> the "equipping of the ship" relates to work done on the ship as opposed to things supplied to it. With respect, this view fails to take into account that the parts or items supplied are often to be affixed to the ship as additional or replacement equipment. Under a single contract, a repairer may have to provide new items and skilled labour. For example, in Lewmarine Pty. Ltd. v. The Ship "Kaptayanni",<sup>87</sup> the rotary pump supplied by the plaintiff company was fitted to the starboard lifeboat which had no pump. It will be unpractical if the service or labour component is dealt with under section 4 and the parts though supplied and worked into the ship by the same repairer are dealt with under section 5.

An interesting element of the case concerns the arrest of the ship. This is a prerequisite for the exercise of the admiralty jurisdiction in rem under section 4. Both the writ and warrant of arrest were issued and served on the ship on the same day (i.e. on 25th March, 1971), apparently in that order, but with some time difference in between. Applying the proposition laid down by Lord Mansfield in Pugh v. Duke of Leeds<sup>88</sup> that "In law there is no fraction of a day", Pape, J., held that the two events took place at the same time. A South Australian case which falls on the other side of the line is Kali Boat Building and Repair Pty. Ltd. v. The Motor Fishing Vessel "Bosna" and Others.<sup>89</sup> The plaintiff company claimed against a motor

86. E.S. Roscoe, The Admiralty Jurisdiction and Practice of the High Court of Justice (5th ed. 1931), p. 207.

87. See footnote above.

88. (1777) 2 Cowp. 714; McGuffie, Fugeman & Gray, Admiralty Practice (vol. 1, British Shipping Laws), pp. 8 and 9. Wherever necessary, the court will always inquire as to the time a particular event took place: Miller v. Teale (1954) 92 C.L.R. 406, p. 411.

89 (1977) 19 S.A.S.R. 112.

fishing vessel and also several defendants for an amount allegedly due for work done on, and necessities supplied to, it. Although the writ and the warrant of arrest were both issued on 19th September, 1977, the former was served on same day, but the latter was not served until 21st September. As the action was not recognizable in the admiralty jurisdiction of the Supreme Court, the writ and the warrant of arrest were therefore set aside. These two apparently conflicting decisions are reconcilable on the ground that a vessel is only "under arrest of the Court" where the warrant of arrest has been served. This event must occur either before, or on the same day, the writ is served on the ship. The date of their issue by the court is irrelevant. Moreover, the wording of the section makes it clear that a creditor has no right to proceed against the ship before the arrest. This right of suing *in rem* only arises from the moment the arrest is effected and has no relation back to the issue of the warrant or the time of the equipping of the ship. That probably explains why, before the right arises, the service of the writ is ineffective.<sup>90</sup>

Section 5. It provides for proceedings *in rem* to be brought against British as well as foreign ships to enforce claims for necessities supplied. Its scope will be considered in the light of case authorities and the two provisos to the section.

I. Australian judges have on the whole endorsed the wide meaning given to the term "necessaries" by English judges. The definition in admiralty law given to it by Abbott, C.J., in Webster v. Seekamp is unparalleled. He said:<sup>91</sup>

"I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man would have ordered, if present at the time, comes within the meaning of the term 'necessary' as applied to those repairs done and things provided for the ship by order of the master, for which the owners are liable."

It has been consistently adopted and applied in both English and Australian cases.<sup>92</sup> The attitude of judges is reflected in the words of

90. [1957] 2 F.L.R. 219, *supra*.

91. (1821) 4 Barn & Ald. 352, 354.

92. The Riga (1872) L.R. 3 A & E 516; Foong Tai & Co. v. Buchheister & Co. [1908] A.C. 458, p. 466 (Privy Council); Christie v. The Ship "Karu" (1926) 27 S.R. (N.S.W.) 443, p. 445, *per* Street, C.J.; followed in Lewmarine Pty. Ltd. v. The Ship "Kaptayanni" [1974] V.R. 465.

Dr. Lushington in The Perla. He said:<sup>93</sup>

"The Court will not put a restricted meaning on the term 'necessaries' in this very beneficial statute so as to confine it to things absolutely and unconditionally necessary for a ship in order to put to sea."

Unfortunately, Abbott, C.J.'s proposition may result in the defeat by shipowners of the purpose of section 5, namely, the provision of in rem actions. For material men, there is a further setback to their claims. Goods and whatever items supplied, which fail to qualify as necessities, fall outside the ambit of the provision. It appears that shipowners are under no personal liability. In such circumstances, the person providing the articles and services is in the position of a volunteer, and the benefits conferred are in the nature of bounties. It is submitted that he is denied the right of recovery under the law of quasi-contract.<sup>94</sup> In practice, however, the problems seldom occur. Ship chandlers and repairers will only supply items and spares on credit when expressly requested by shipowners or their agents who act in compliance with the reports of surveyors. It is plausible that the judicial recognition of the exclusive right of shipowners to determine what are necessities is based on maritime law principles. Shipowners are personally duty-bound to ensure that their ship is seaworthy and that the statutory requirements are met.

II. | The remedy provided by section 5 is subject to two conditions to be satisfied. First, an action in personam must lie against the owner at the time when the in rem suit is instituted. This requirement is not met where the claim is unenforceable, e.g. when statute-

93. (1858) Swab. 353, 354, when speaking of the Admiralty Court Act 1840 (Imp.), s. 6.

94. The commonly quoted statement of Bowen, L.J., in Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch. D. 234, pp. 248-249, is the authority: "The general principle is, beyond all questions, that the work or labour done or money expended by one man to preserve or benefit the property of another does not according to English law create any lien upon the property saved...nor even create any obligation to repay the expenditure." See also Stoljar, The Law of Quasi-Contract (1964), pp. 178-180.

barred. Second, it is not every supply of "necessaries" to a ship that will render her owners personally liable. This problem is highlighted in the decision in Shell Oil Company v. The Ship "Lastrigoni".<sup>95</sup> A foreign ship under a time charter to M.L.S.A. was arrested in Melbourne and proceeded against in admiralty. The plaintiffs sought to recover \$103,230.50 for bunkers supplied to the ship under a contract made between themselves and the charterers. Clause 6.4 of the contract, to which the shipowners were not a party, read:

"Security. Each sale and delivery hereunder will be made on the faith and credit of the vessel to which delivery is made, as well as the faith and credit of Buyer."

It was not disputed that the shipowners were under no contractual liability to pay for the bunkers. Both the writ of summons and warrant of arrest were set aside. The general rule of admiralty applied was that an action in rem cannot be maintained unless there is liability in the shipowners.

Two of the views of Menzies, J., on section 5 are noteworthy. The first is that necessaries are only "supplied to any ship" within its meaning if they are supplied for the owner. This interpretation admits of one exception. In referring to the Privy Council decision in Foong Tai & Co. v. Buchheister & Co.,<sup>96</sup> Menzies, J., said:<sup>97</sup>

"The case is not an easy one. But it seems to me to have been decided upon very special facts, namely that, although the defendant was not the owner of the ship in question, it was the equitable owner and that the expenditure for necessaries was to its benefit."

His second view may be seen as a warning to creditors contemplating admiralty actions in rem. Thus proceedings under the section are not intended "to allow pressure to be put upon a person who is himself under no liability in respect of the liabilities of others." Where loss is caused to the shipowner or charterer as a result of the wrongful arrest of the ship, courts should be prepared to award damages.<sup>98</sup>

95. [1974] 48 A.L.J.R. 295.

96. [1908] A.C. 458, supra.

97. [1974] 48 A.L.J.R. 295, p. 297.

98. Cf. Dalgety & Co. Ltd. v. Aitchison; The "Rose Pearl", where the counterclaim for damages for wrongful arrest failed: [1957] 2 F.L.R. 219, p. 222.

III. The remedy open to creditors in section 5 suffers an inherent weakness. It is easy for shipowners, as debtors, to put the ship beyond the admiralty jurisdiction of Australian courts. Under the law, no action in rem will lie if at the time of its institution the debtors no longer own the ship. In The Henrich Bjorn,<sup>99</sup> the appellants brought an admiralty suit for recovery of moneys they had advanced in March 1882 for equipping, and supplying the necessary stores to, a Norwegian ship then lying in the port of Liverpool. Unfortunately, between March 1882 and the time when the suit was instituted, there was a change in the ownership of the ship. In affirming the decision of the Court of Appeal, the House of Lords held that the action could not be maintained.

Naturally, courts will set themselves against any devious transactions fabricated by shipowners to oust their jurisdiction and defeat the rightful expectations of creditors. Shipowners who are personally liable to pay for the necessities supplied are required to discharge a heavy burden of proof. It must be strictly established that on the date of the issue of the warrant of arrest and writ of summons they have completely divested themselves of their title to and interest in the ship. Courts tend to give to material men the benefit of any doubt on the matter.

In Dalgety and Co. Ltd. v. Aitchison, which came before the Supreme Court of the Northern Territory. The "Rose Pearl" was arrested on 18th July, 1957, in the port of Darwin. In the action, the plaintiff company sought to recover the price of necessities previously supplied to the ship at ports in New Zealand, Rabaul and Noumea. On 23rd July, 1957, an appearance was entered for "Bruce Aitchison the owner of the abovenamed ship." Judgment was given for the plaintiff company. The main flaw in the defendant's case was that the bills of sale, by which he claimed to have purchased the ship on 12th July, 1957, were for various reasons held to be ineffective to transfer the ship. What the defendant should have done is underlined in the words of

99. C. & C.J. Northcote v. The Owners of the Henrich Bjorn  
[1886] 11 App. Cas. 270, supra.

the learned judge Kriewaldt:<sup>1</sup>

"Finally, evidence of acts of ownership cannot prevail against an established legal title; hence until the formalities requisite to effect a transfer of ownership have been effected the Crescent Corporation must be taken to be the owner...."

One submits that it is insufficient that an enforceable contract for the sale of the entire ship has been made or that the equitable interest in the ship has been assigned to another. The reasoning, which underlies the above decision, is consistent with the Privy Council decision in Foong Tai & Co. v. Buchheister & Co.<sup>2</sup> Its effect is to render section 5 applicable where necessities had been supplied to a person on the credit of the ship provided that at the time the action was instituted he was an equitable owner.

The right to sue in rem is lost where the ship is destroyed or forfeited under the law. Equally it does not extend to insurance moneys recovered from underwriters for her loss or to the proceeds of a voluntary sale effected before the arrest.

The Provisos. In two situations, a creditor is expressly precluded from invoking the jurisdiction of the court under section 5. They are the supply of "necessaries to any ship...in the port to which the ship belongs" and proof to the "satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." The underlying reason for the provisos was probably the High Court of Admiralty's reciprocal acknowledgement of the jurisdiction of Common Law Courts in return for the common law judges' consent to the enactment of the Imperial Act. In either of these situations, the necessities can be supplied on the credit of some person or the undertaking given by some financial institution. The liability incurred will give rise to personal claims which can be enforced at common law without difficulty. By section 2 (3) (a) of the Colonial Courts of Admiralty Act 1890 (Imp.), the words "England and Wales" shall be read to mean "British possession".

In relation to Australia, the provision in section 2 (3) (a) might create some difficulty. Despite the passing of the Statute of

1. [1957] 2 F.L.R. 219, p. 233.

2. [1908] A.C. 458.

Westminster Adoption Act 1942 (Comth.), the Commonwealth of Australia has been held to be a British possession.<sup>3</sup> An Australian State would then be a possession within a (larger) possession. If this reasoning is pushed to the extreme, it could imply that the remedy provided by section 5 would not be available if a shipowner or part-owner was domiciled within any part of Australia at the time when the action was commenced. It is submitted that this view is untenable.

A case where the two provisos are involved is the Kali Boat Building and Repair Pty. Ltd. v. The Motor Fishing Vessel "Bosna" and Others.<sup>4</sup> In the admiralty action, the plaintiff claimed against a vessel and several defendants for sums due for work done on, and materials supplied to, the vessel. At all material times, the vessel was registered at Port Adelaide in the Register of British Ships. The personal defendants were domiciled in South Australia. Moreover, the work was done and necessities supplied at Port Adelaide. The warrant of arrest and the writ were set aside as the provisions of section 5 were rendered inapplicable.

It is important not to confuse a judicial pronouncement, previously discussed, with one of the provisos to the section 5. The former operates to defeat an action in rem if at the time when it is instituted the debtor has divested himself of his title to and interests in the ship. The proviso "unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in [the British possession]" fulfils a different objective. It is to enable the in rem action including the warrant of arrest to be set aside so that the owner or part owner domiciled in an Australian State may be proceeded against personally. The purpose of the legislature is not to defeat the creditor's

3. McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd. (1945) 70 C.L.R., p. 192, per Latham, C.J.; see also China Ocean Shipping Co. and Others v. State of South Australia (1979-80) 27 A.L.R.1, p. 8, where Barwick, C.J., held that prior to the 1942 Act (Comth.) the Commonwealth was no more than a self-governing colony.

4. [1977] 19 S.A.S.R. 112.

claim but to substitute an action in personam for one in rem. This reason justifies a different meaning being given to the word "owner" in the proviso.

Following the Privy Council decision in Foong Tai & Co. v. Buchheister & Co.,<sup>5</sup> Mitchell, J., construed the word "owner" in section 5 to mean beneficial owner. He relied on Stapleton v. Haymen<sup>6</sup> as a "clear authority for the proposition that the property in the ship passes by the bill of sale and is not dependent on the registration of that bill of sale."<sup>7</sup>

#### V. CONCLUSION

A number of gaps in maritime law have been filled by Commonwealth and State legislation which provides for compensation. However, where an action in rem avails for injuries or loss of life,<sup>8</sup> it offers certain distinct advantages over the statutory remedy. A successful claimant is able to recover more compensation under maritime law than under the relevant enactment.<sup>9</sup> In admiralty proceedings in rem, once the writ of summons is issued, even though it is not served, the right of a claimant is not affected by the subsequent change of ownership of the vessel. Unfortunately, the right to enforce payment of statutory compensation by detaining the ship is not

5. Supra.

6. (1864) 33 L.J. Ex. 170. Mitchell, J., rejected the proposition in Rochester v. The Garden City [1908] A.C. 458 that the word "owner" in the Admiralty Court Act 1861 (Imp.), s. 5 meant "registered owner". He distinguished the decision on the ground that the finding must be read in relation to the facts of the case.

7. [1977] 19 S.A.S.R. 112, p. 115.

8. As to persons who may bring the action where death is wrongfully caused, see P.F.P. Higgins, Elements of Torts in Australia (1970 ed.), pp. 537-540.

9. E.g., Seamen's Compensation Act 1911-73 (Comth.), Third Schedule, specifies the amount of compensation recoverable in relation to the different types of injury suffered.



exercisable when the title to the ship is transferred. In contrast to the statutory remedy which is usually enforceable only within Australia, the right to sue in rem is not so restricted. Under the laws of the United Kingdom<sup>10</sup> and Singapore,<sup>11</sup> for example, the claimant may institute proceedings in rem against the same ship or a sister ship.

The claim, whether brought under maritime law or for statutory compensation, is for injuries or loss of life suffered by the seaman. It submitted that the proposed Admiralty Act (Comth.) should confer jurisdiction on Australian courts to entertain "no-fault" claims based on Commonwealth and State legislation.<sup>12</sup>

The Hague Rules suffer one major setback. Courts tend not to interfere with bill of lading clauses inserted by carriers which are adjudged to be outside the scope of the Hague Rules. As has been shown in The Cap Blanco,<sup>13</sup> a jurisdictional clause in a bill of lading may prevent a cargo claimant from proceeding in rem against a ship. Unless struck down by rule 8 of Article III, an arbitration clause could have a similar effect. It is unfortunate that there is no provision in the Hamburg Rules to extend the rights of cargo claimants under the admiralty law.

A grave stumbling block to modern methods of cargo transportation is the use of the term "bill of lading" in section 6 of the Admiralty Court Act 1861 (Imp.). It operates to prevent holders of "combined transport documents", "through bills of lading" and possibly

10. See Chapter Nine.

11. High Court (Admiralty Jurisdiction) Act, Cap. 6, Singapore Statutes, Rev. Ed. 1970, s. 3 (1) (f).

12. The decision in The Moliere [1925] P. 27 makes the position clear. It was held that claims in respect of loss of life which give no right of action for damages but only a right to statutory compensation fall outside the admiralty jurisdiction. Cf. The Annie [1909] P. 176. An accident occurred as a result of the negligence of the defendants' servants in navigating their vessel. The sum paid by the plaintiff under the Workmen's Compensation Act 1906 (U.K.) was held to be recoverable as no damages in an admiralty action in personam.

13. [1913] P. 130.

non-negotiable receipts<sup>14</sup> from invoking the section.

The provisions conferring jurisdiction on courts in respect of necessities supplied are too restrictive. One undesirable consequence is that material men in Australia tend to favour foreign, rather than locally-based, ships. The reason is that where there is default in paying for necessities provided on credit, proceedings in rem may generally be instituted against foreign ships in Australia.<sup>15</sup> Hence from the viewpoint of credit-worthiness, the provisions discriminate against locally-owned ships.

This chapter has highlighted a number of areas where reform is urgently needed.

14. As to non-negotiable receipt, see Hague Rules Art. 6; Harland & Wolff Ltd. v. Burns & Laird Lines Ltd. 40 Ll. L. Rep. 286. In Hugh Mack & Co. v. Burns & Laird Lines Ltd. 77 Ll. L. Rep. 377, the reference on the receipts was to "sailing bills. Non-negotiable".
15. Admiralty Court Act 1861, s. 5. Cf. s. 4 relating to claims for building, equipping and repairing of ships.

## CHAPTER 7

### MARITIME LIENS

#### I. INTRODUCTION

The aims of this chapter are to trace the development of maritime liens and to ascertain how far the principles of English maritime law have become part of the Commonwealth and State laws. The problem areas will be highlighted and suggestions made as to the changes which are deemed desirable.

The words "maritime lien" did not originate from English admiralty diction. According to Scott, L.J., they were borrowed from the French who used the telling phrase "*créances privilégiées*" to describe the secured rights of sea creditors in the reciprocal adjustment made under sea law. He equates the "privilege" of continental law with "maritime lien" in English law.<sup>1</sup> It is questionable how far continental law has accorded to the term the unique attributes which a maritime lien enjoys under English law.

In delivering the Privy Council judgment in The "Bold Buccleugh", Sir John Jervis said:<sup>2</sup>

"Having its origin in the rule of civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process."

The right is inchoate from the moment when the claim attaches. When carried into effect by legal process, it relates back to the time of its attachment.<sup>3</sup> It is a right acquired by a person over a maritime property belonging to another — "*a jus in re aliena*". It is a "subtraction from the absolute property of the owner"<sup>4</sup> in the *res*. Since it travels with the vessel into whosoever's possession she may come, the lien may be enforced even against a *bona fide* purchaser for value and without knowledge of its attachment.<sup>5</sup> It is secret in character

1. The Tolten [1946] C.A. 135, pp. 149-150.

2. (1851) 7 Moo. P.C. 267, 284.

3. The principle that a damage lien relates back to the moment it first attaches was originally laid down by the Privy Council in The Bold Buccleugh (1851) 7 Moo. P.C. 267. It was later approved by the House of Lords in Currie v. M'Knight [1897] A.C. 97. It has been assumed without question that every maritime lien has the "relation back" operation.

4. The Ripon City [1897] P. 226, p. 242, *per* Gorell Barnes J., cited with approval in The Tolten [1946] C.A. 135, p. 145.

5. Ibid., 241.

and renders unavailable to such a purchaser the protection of the principle of equity. Its value as security is enhanced by the fact that its existence is not dependent on possession of the res by the lienee. While a bottomry lien is transferable,<sup>6</sup> the lien for seamen's wages may be assigned only with the sanction of the court.<sup>7</sup>

## II. WAGE AND DISBURSEMENT LIENS

### 1. Origin of Wage Lien

There is doubt as to how or when the maritime lien for seamen's wages came into existence. Paul Herbert advanced the "historical" and "procedural" theories to explain the origin of maritime liens in English law.<sup>8</sup> Sir W. Holdsworth believes that in sixteenth-century England there was very little evidence of the maritime lien for wages.<sup>9</sup> Thomas states that the first trace of its existence arose in Johnson v. The "Black Eagle", decided in 1597,<sup>10</sup> where a decree for wages and other debts were pronounced against a ship. There is a view that brings the date of its existence forward by over a century. In Wells v. Osmond, decided in 1704,<sup>11</sup> despite the statute of Richard II,<sup>12</sup> Holt, C.J. refused to grant a prohibition against proceedings in the Court of Admiralty for seaman's wages. Marsden contends that this refusal could have proceeded from the recognition of a charge or lien for wages given by maritime law, which could only be enforced in admiralty.<sup>13</sup>

6. Rhind v. The Zita [1924] Gaz. Law Rep. (N.Z.) 7, pp. 7-8; for same view, see also G. Price, Law of Maritime Liens (1940) pp. 72-73.

7. The Fair Havens (1866) L.R. 1 A. & E. 67; The Bridgewater (1877) 3 Asp. 506.

8. P.M. Herbert, "The Origin and Nature of Maritime Liens" (1929-1930) 4 Tul. L.R. 381, pp. 382 et. seq.

9. Sir W. Holdsworth, A History of English Law (reprinted 1966) vol. 8, p. 271, footnote 8.

10. D.R. Thomas, Maritime Liens (1980), p. 175, where reference is made to Marsden, Select Pleas in the Admiralty, Vol. II, 1 xxiv.

11. 2 Raym 1044.

12. 13 Richard II, St. 1, c. 5.

13. R.G. Marsden, "Two Points of Admiralty Law" (1886) 2 Q.L.R. 357, p. 366.

One of the early nineteenth-century cases which unambiguously recognised the lien is The "Neptune", decided in 1824.<sup>14</sup> Parts of a ship saved by the mariners were the only assets available to pay their wages. In spite of the long-standing maxim that "freight is the mother of wages", Lord Stowell in his judgment gave effect to the lien on the ship's remains for the wages.

A number of reasons underlay the juridical initiative. Seamen, often poor and illiterate, risked their lives in the service of the nation's merchant navy. The ancient jurisdiction of the Court of Admiralty over actions in rem, as distinct from personal actions, is partly attributed to considerations given to the ship as more than a res. Since the birth of the "British ship" concept under the statute of Williams III in 1696,<sup>15</sup> a foreigner has never been permitted to hold any share in a British ship. Both in English and American laws, there was a tendency to personify the ship. An American supreme court judge has said:

"She [a ship] acquires a personality of her own, becomes competent to contract, and is individually liable for her obligations, upon which she may be sued...in her own name."<sup>16</sup>

We have seen that between the reigns of Charles II and William IV (until June 1837) which extended for about 150 years, covering the British Empire-building phase, a series of enactments were passed. Legislative encouragement was aimed at expanding the merchant navy and transforming it into a viable colonising and trading force. Moreover, by law at least seventy-five percent of the ship's crew, including her master, had to be British subjects.<sup>17</sup> The Court of Admiralty must have translated the Empire-building plans into action. In this context, the creation at the beginning of the nineteenth century of

14. 1 Hagg. 277; 166 E.R. 81.

15. 7 & 8 Will. III, c. 22; see Chapter Four.

16. Tucker v. Alexandroff (1902) 183 U.S. 424, 428; see also P.M. Herbert, "The Origin and Nature of Maritime Liens" (1929-1930) 4 Tul. L.R. 381, p. 392. As to case where a ship was regarded as employer, see Casey and Others v. The Deccan [1906] S.A.L.R. 125.

17. See Chapter Four.

the wage lien on a ship<sup>18</sup> could be seen as a necessity in promoting the nation's shipping policy. There was no conscious attempt by English Admiralty Court judges to bring the rights of seamen into line with those of their counterparts under continental laws. The wage lien conferred on seamen (mainly British subjects) a valuable security for the payment of their wages, particularly where the shipowner or demise charterer defaulted or became insolvent.

That the above reasoning seems correct is supported by the compromising attitude of the Common Law and Admiralty Court judges. The statutes of Richard II<sup>19</sup> forbade Admiralty Court judges "to meddle with anything done within the realm." However, except where seamen had been employed under special contracts or deeds executed on land, common law judges rarely interfered with suits for wages in the Court of Admiralty, even though the general contracts had been made on land. It seems that the restraint was exercised by common law judges to promote the national policy and enable seamen to take advantage of the more effective remedies. For example, in Woodward v. Bonithan,<sup>20</sup> Anonymous<sup>21</sup> and Wells v. Osmand,<sup>22</sup> where general contracts for seamen's wages were involved, prohibitions were refused. The reasons given were that, for the benefit of seamen, the "ship is made liable to them; and there they may all join in the suit."<sup>23</sup> Admittedly, these proceedings were not available at common law.<sup>24</sup>

18. D.R. Thomas submits that "by the beginning of the nineteenth century its existence (i.e. the wage lien) was assumed without dispute": Maritime Liens (1980), *op. cit.*, p. 175.

19. 13 Richard 2, St. 1, c. 5; 15 Richard 2, c. 3.

20. Sir Thomas Raym. 3.

21. 1 Ventr. 146.

22. (1704) 2 Raym. 1044.

23. Howe v. Nappier (1766) 4 Burr 1945, 1946.

24. The sympathy of judges was shared by the British Parliament. By the statute of (1705) 4 Anne, c. 16, s. 17, the Court of Admiralty was given jurisdiction to entertain wage suits. The material words of the section are: "That all suits and actions in the Court of Admiralty shall be commenced and sued within six years...."

The illogical distinction made between general or ordinary contracts and deeds meant that claims of seamen employed under the latter would not be protected by the lien and were outside the jurisdiction of the Court of Admiralty. In Britain, the anomaly was rectified by the Merchant Shipping Act 1854 (Imp.). In every British seaport which had a local marine board, a shipping office was established to facilitate the engagement and discharge of seamen. As the superintendents had control over the mode of conducting the business at such offices, it was unlikely that a uniform contract would not be used so as to give seamen the benefit of the wage lien.

Another anomaly concerns the different and discriminatory treatment of master's wage claim. It was consistently decided by a line of cases that, unlike a seaman, a ship's master had no charge or lien on the ship for his wages.<sup>26</sup> In Wilkins and Others v. Carmichael an action of trover was brought by the assignees of a bankrupt shipowner against the captain. The defence raised was that the captain had a lien on the ship for his wages and for stores supplied on his order. Judgment was given for the plaintiffs. The reasons for the non-recognition of the lien, at least by the common law judges, were stated by Lord Mansfield as follows:<sup>27</sup>

"As to wages, there was no particular contract that the ship should be a pledge; there is no usage in trade to that purpose; no stipulation from the nature of the dealing. On the contrary, the law has always considered the captain as contracting personally with the owner...."

Despite the personification of the ship, pre-1845 admiralty law had treated the master as an alter ego of the shipowner rather than as an employee of the ship. Moreover, it was in principle inconsistent that a ship, placed under the personal charge of a master for the purpose of achieving his employer's goals, should become subject to the former's wage lien.

25. See 17 & 18 Vic., c. 104, ss. 122-124.

26. See e.g. Clay v. Sudgrave, 91 E.R. 34, confirmed in Bagley v. Grant, 12 Mod. 440.

27. (1779) 1 Doug. 102, 105.

The heyday of ships' masters came when their wages were accorded similar protection as the wages of seamen. Section 16 of the Merchant Shipping Act 1844<sup>28</sup> read:

"That all the rights, liens privileges, and remedies...which by this Act, or by any law, statute, custom, or usage belong to any seaman or mariner, not being a master mariner, in respect to the recovery of wages, shall, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships...in respect to recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects."

One of the earliest cases where the provision was construed was The "Julindur".<sup>29</sup> The master proceeded against the vessel for wages due for services rendered on her and on another vessel belonging to the same owner, who had become bankrupt. The High Court of Admiralty held that the master's lien on a vessel was confined to the services rendered on that vessel. It meant that a captain, who had served on several ships, though owned by the same person, and who had not been paid his wages, had to proceed against each of the ships separately in order to enforce the lien. As the lien for wages earned on one vessel did not extend to wages earned on a sister ship, the security provided is, in that respect, unsatisfactory. Lord Watson has pointed out that, as a legislative policy, the lien for the wages of master and crew attaches to the ship independently of any personal obligation of the owner provided that such wages have been earned on the ship.<sup>30</sup> The liens for the wages of master and crew have remained a feature of the Merchant Shipping Acts (Imp.).<sup>31</sup>

## 2. Laws in Australian Colonies and States

Wage lien. There is evidence that the maritime lien for wages, regarded as the foundation of admiralty jurisdiction in England, was part of the laws received into the Australian colonies. The scarcity of early Australian cases on the subject is attributed to several reasons. Under various colonial enactments, Shipping Masters were

28. 7 & 8 Vic., c. 112, s. 16.

29. (1853) 1 Sp. Ecc. & Ad. 72; 164 E.R. 42.

30. The "Castlegate" [1893] A.C. 38, p. 52.

31. 1854 Act, ss. 182 and 191; 1894 Act, ss. 156 and 167; see also Merchant Shipping Act 1970 (c. 36) (U.K.), ss. 16 and 18.



appointed to ensure the payment of wages to seamen on their discharge, and to deal with disputes.<sup>32</sup> The unambiguous provisions made it difficult for shipowners to deprive seamen of their wages. To prevent admiralty proceedings in rem from unduly interfering with the employment of a ship, wage claims below a certain amount (e.g. twenty pounds in New South Wales) could only be brought by summary action. An exception to this rule was allowed where the shipowner was bankrupt or insolvent.<sup>33</sup> In that situation, in rem proceedings would confer on seamen the distinct advantage of the maritime lien. This gave them the priority of payment over the shipowner's other creditors.

It will be recalled that the wage lien was created by the admiralty judges partly to promote Britain's shipping policy. In that respect, the colonial legislatures placed the matter on a sound footing. It is interesting to note that the New South Wales Merchant Seamen Act 1849,<sup>34</sup> which applied to Queensland and Victoria, the Marine Board and Navigation Act 1881 (S.A.)<sup>35</sup> and the Merchant Seamen Act 1859 (Tas.)<sup>36</sup> gave effect to the lien. These Acts prohibited shipowners and demise charterers from contracting out of the ship's liability. They expressly provided that "No seaman of any ship by reason of any agreement shall forfeit his lien upon the ship...."

In an action to recover wages, seamen may have a ship arrested in a foreign port. Pending its outcome, severe hardships could be inflicted on the seamen who are denied their rations. In Victoria the serious gap in the law has been remedied. The case of Keeney and Others v. The Ship "Aneiura"<sup>37</sup> concerned an action in rem against a

32. Merchant Seamen Act 1849 (N.S.W.) (13 Vic. No. 28), s. 4; Seamen's Laws Consolidation Act 1864 (N.S.W.) (27 Vic. No. 13), s. 39; Merchant Seamen Act 1859 (Tas.) (23 Vic. No. 7), s. 43; and Marine Board and Navigation Act 1881 (S.A.) (44 & 45 Vic. No. 237), s. 82.

33. Merchant Seamen Act 1849 (N.S.W.), s. 19; Seamen's Laws Consolidation Act 1864 (N.S.W.), s. 49; Merchant Seamen Act 1859 (Tas.), s. 50; Marine Board and Navigation Act 1881, (S.A.), s. 90.

34. S. 4. Obviously the provisions in the colonial enactments were modelled on s. 5 of the Imperial Act, 7 & 8 Vic., c. 112.

35. S. 82.

36. S. 43.

37. (1927) V.L.R. 387, p. 389; order of Mann, J., in Paul & Gray Ltd. v. The Ship "Amy Turner" (1922) V.L.R. 740, p. 743, referred to.

foreign ship brought by the master and seamen. Their claims were for wages due to them and for the cost of their passage back to the United States pursuant to the terms of the articles. After the ship had been arrested, the provisions on board were almost exhausted, and the crew could not obtain fresh food. A shipping broker was prepared to advance money for the period of four to five weeks, at eight per cent interest, for purchasing food. His term was that the court was to grant him a first charge or maritime lien on the ship or the proceeds of her sale for the advances made and the interest charged. An order to that effect was made. The decision is a sensible and indeed needful extension of the wage lien. It appears from the authorities that a person who pays the wages of one or more of the crew with the leave of the court may be given the same lien on the ship or the proceeds of her sale which the seamen possess. In other words, under maritime law, he is subrogated to the rights of the lienee.

It is crucial to consider whether under the law in Australia a ship or the proceeds of the sale would become subject to a lien for master's wages. A case directly in point is The "Rajah of Cochin".<sup>38</sup> After the ship had arrived at Mauritius, the captain was in such a state of ill health that it justified his leaving the ship. The ship was subsequently arrested in England. The amount claimed by the master as wages, when he left the ship by necessity, was disputed. Dr. Lushington held that a master's right to recover wages under section 209 of the Merchant Shipping Act 1854 (Imp.) in such circumstances applied to the colonies, and that it was an additional provision in favour of seamen. His judgment made it plain that, by section 191 of the Act (Imp.), a master had a lien for his wages in the Vice-Admiralty Court, whatever might be the municipal law of the colony. He referred to the notable exception, viz. the proviso to section 547, which prevented "the whole of the Act extending to the colonies." "It would be impossible to construe this Act without supposing it extended to our

38. (1859) Swab. 474. S. 158 of Merchant Shipping Act 1894 (Imp.) has been repealed and replaced by s. 4 of Merchant Shipping Act 1970 (Imp.). The position under the Navigation Act 1912-1973 (Comth.) will be considered in due course.

colonies, for otherwise there are provisions applying to them, which would not confer the benefit the statute was intended to do, but would produce confusion and discord." <sup>39</sup>

In the light of the proviso to section 547 and of what Dr. Lushington said, it is necessary to consider the status of the colonial enactments dealing with maritime liens. Part III of the 1854 Act (Imp.) concerned, inter alia, the wages of seamen and masters engaged in British ships registered in the United Kingdom and the colonies. Section 109 defined the scope of Part III as follows:

"So much as the Third Part of this Act as relates to Rights to Wages and Remedies for the Recovery thereof...shall apply to all ships registered in any of Her Majesty's Dominions abroad [ i.e. including the colonies], when such Ships are out of the jurisdiction of their respective Governments, and to the Owners, Masters and Crews of such Ships."

The section showed some leeway given to colonial legislatures. Probably an Australian colony could enact laws applicable to ships registered therein so long as they were within the colonial government's jurisdiction. Where the principles of Admiralty Court decisions or the provisions of Part III of the 1854 Act (Imp.) were in substance reproduced in colonial enactments, their objective was clearly to apply English law. Since they did not "repeal, wholly or in part, any provision" of the Imperial Act, they appear to fall outside section 547 of the 1854 Act and also section 735 of the 1894 Act (Imp.). It is submitted that the provisions, which conferred on masters and seamen maritime liens in respect of their wages, in the Merchant Seamen Act 1849 (N.S.W.), the Marine Board and Navigation Act 1881 (S.A.) and the Merchant Seamen Act 1859 (Tas.) were valid.<sup>40</sup> Dr. Lushington's fears that, unless the Act applied to colonies, confusion and discord would prevail were therefore unfounded.

Wage liens have continued to be a feature of succeeding colonial legislation. The enactment of section 736 in the Merchant Shipping Act 1894 (Imp.) presented Australian legislators with difficulties. The local legislation, which could be construed as being related

39. Ibid., 476.

40. Sections referred to above.

to coasting trade, would be held invalid for not meeting the requirements of section 736. The conditions to be satisfied as regards the "suspending clause" and the public signification of "Her Majesty's pleasure" suggest that indefinite delays might occur before a "coasting trade" enactment could be operative. Rather than exposing the livelihood of colonial seamen and masters to uncertainty, since Her Majesty's pleasure might not be granted, a number of the colonies circumvented section 736 by adopting a convenient and expeditious course. Tasmania,<sup>41</sup> Victoria<sup>42</sup> and Western Australia<sup>43</sup> passed, as "reception" mechanisms, Acts to extend to their respective territories those provisions of the Imperial Act relating to seamen and masters, including the law with respect to wage liens. In fact, section 264 of the 1894 Act (Imp.) empowers the legislatures of British possessions to modify and apply for such purposes any provisions of the Act that will not otherwise apply.

Disbursement Lien. We shall look at the right of a ship's master to be reimbursed with regard to personal liabilities incurred in obtaining supplies to, or repairs done on, the ship. Strangely enough, the only remedy open to a master to recover disbursements was by a personal action against the shipowner in a Common Law Court.<sup>44</sup> By section 191 of the Merchant Shipping Act 1854 (Imp.), the master was, for the first time, indirectly allowed in special circumstances to sue for disbursements in the Court of Admiralty. Take the case of a suit by a master for wages and a set-off or counter-claim being set up by the shipowner. It would then be competent for the Court to settle all accounts outstanding between the two parties, and to enforce against the ship payment of the balance owing to the master as wages and disbursements. The Act did not permit a master to initiate a suit

41. Merchant Seamen Act 1935 (Tas.), s. 3 (1).

42. Seamen Statute 1865 (Vic.), s. 3; Marine Act 1890 (Vic.), s. 230. The section was preserved in the Marine Acts (Vic.), 1915, 1928 and 1958, s. 234 until its repeal.

43. Merchant Shipping Act Application Act 1903 (W.A.), s. 2 (1).

44. The Mary Ann (1865) L.R. 7 A. & E. 8, p. 10, per Dr. Lushington.

direct in the Court of Admiralty for the disbursements. It was partly to remedy this defect that the Court of Admiralty Act 1861 (Imp.) was passed.<sup>45</sup> Section 10 gave the High Court of Admiralty jurisdiction, inter alia, "over any claim by the master...for disbursements made by him on account of the ship." In Mary Ann, Dr. Lushington held that, by extending the jurisdiction so as to enable the Court to deal with the subject-matter in other cases, the legislature must be taken to have intended to create a maritime lien. His proposition was apparently prompted by the inadequate protection given by the pre-1861 law to masters who had incurred disbursements for the ship.<sup>46</sup> The construction was followed by Sir Robert Phillimore in The Feronia<sup>47</sup> and the English Court of Appeal in The "Sara".<sup>48</sup> However, when The "Sara" was later taken on appeal, the House of Lords, after examining the cases where the master was held to have had a maritime lien in respect of disbursements, unanimously reversed the Court of Appeal decision.<sup>49</sup> Lord Watson emphasised that neither the Merchant Shipping Act 1854 (Imp.) nor the Court of Admiralty Act 1861 (Imp.) "expressly attaches a lien to his [the master's] claim for disbursements."<sup>50</sup>

One grave consequence of the House of Lords decision was injustice to creditors who had provided necessities to ships in reliance on the proposition first laid down in 1865. In overt support of Dr. Lushington's approach, the Merchant Shipping Act 1889 (Imp.) was passed. Section 1 provided that "Every master of a ship...shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements properly made...and for liabilities properly incurred by him on account of the ship, as a master now has for the recovery of his wages...." The qualifying words "so far as the case permits" suggest that certain disbursements or liabilities will not give

45. This Act extends to Australia. See Chapters Six and Nine.

46. (1865) L.R. 7 A. & E. 8, p. 12.

47. (1868) L.R. 2 A & E 65.

48. 12 P.D. 158.

49. The decisions overruled included those in The Glentanner, Swab. 415; The Mary Ann (1865) L.R. 7 A & E 8; The Feronia L.R. 2 A & E. 65; and The Ringdove 11 P.D. 120.

50. The "Sara" (1889) L.R. 14 P.C. 209, p. 217; see also p. 214, per Halsbury, L.C.

rise to the lien. Its scope was considered by the House of Lords in The "Castlegate".<sup>51</sup> By a non-demise charterparty, the charterers undertook to "provide and pay for all her coals." The master who had notice of its terms obtained the coals and drew on the charterers for payment. After the bill was dishonoured, the master, who was sued on it, instituted an action in rem for disbursements against the ship and freight. A master's authority was held to have arisen from the necessity of protecting the interests of the party concerned. As the disbursements were incurred for the charterers' benefit to enable the vessel to prosecute the voyage, they were therefore not made on account of the ship or her owners. The House of Lords held that, as the shipowners were not personally liable for the disbursements, the master had no maritime lien on the ship. Lord Watson's narrow interpretation serves as a caution to creditors. The 1889 Act (Imp.) did not empower a master to fix upon the ship a liability which he did not, expressly or impliedly, have her owners' authority to incur.<sup>52</sup> With regard to the alleged maritime lien on freight in respect of disbursements, the House of Lords applied the principle stated by Lord Ellenborough, C.J., in Smith v. Plummur. He said:

"Then if he [the master] has no lien on the ship...he can have none upon the freight, as the lien on the freight is consequential to the lien upon the ship."<sup>53</sup>

The "disbursement lien" provision has been reproduced in section 167 (2) of the Merchant Shipping Act 1894 (Imp.). In The Elmville (No. 2),<sup>54</sup> the question arose whether the word "disbursements" would include costs which a master was liable to pay. A master drew a bill of exchange on the shipowners in payment for bunker coal supplied to the ship. After the bill of exchange was dishonoured and the master was sued as its drawer, he unsuccessfully defended the action and incurred costs. The decision depended on whether it was reasonably necessary in the interests of the ship to defend the action. Sir F.H. Jeune found that, since by allowing judgment to go by default

51. [1893] A.C. 38.

52. Ibid., p. 53.

53. (1818) 1 B. & Ald. 575, 582.

54. [1904] P. 422.

he could recover against the ship based on the lien, he had acted in his capacity as an individual and not as master of the vessel.<sup>55</sup> Thus the lien does not extend to the costs of such defence.

Another aspect of the disbursement lien, which has great significance for suppliers of necessities, is raised in The Ripon City.<sup>56</sup> By a contract of sale, the defendant owners (F.W. Co.) transferred the possession and control of the ship to a Glasgow firm (N.M. Co.). Under the terms of sale, F.W. Co. were to remain registered owners and mortgagees until the purchase-money was paid. On a voyage to the River Plate an account of N.M. Co., the master, who was appointed by N.M. Co. and had no notice of the contract of sale, drew two bills of exchange on N.M. Co. for the bunker coal supplied according to a contract made previously between N.M. Co. and C.B. Co. The bills were dishonoured on maturity. F.W. Co., as unpaid vendors, retook possession of the vessel. By a signed memorandum of mandate, declared to be irrevocable, the master authorised C.B. Co. to exercise in his name, or their own, his right of lien against the ship in respect of the two unpaid bills. The money recovered was to be applied in extinction pro tanto of his indebtedness to them on the two bills. However, before the trial F.W. Co. and the master entered into a settlement. A receipt was taken from the master for £400 paid to him in full settlement of his claims against F.W. Co.. He also agreed to all proceedings in the action being forthwith stayed. The present action was initiated by C.B. Co. in the name of the master as nominal plaintiff. G. Barnes, J., held that F.W. Co. had sufficient notice or knowledge of the facts to render the settlement void as against C.B. Co.. As the liability was incurred by the master an account of the ship, he had a valid maritime lien under section 167 of the Merchant Shipping Act 1894. The court found that, as he had no knowledge of any facts which would deprive him of his right of lien, he was entitled to look to the ship as security for his claims. However, as in The "Castlegate",<sup>57</sup> the shipowners were not under any personal liability for

55. It is in line with an earlier decision in The Orienta [1895] P. 49 (English Court of Appeal). A master, who at the request of the shipowners drew a bill of exchange on them for the payment of coals supplied, was held not to have incurred liability by him in his office as master. Hence he had no lien on the ship for disbursements.

56. [1897] P. 226. For summary of the facts, see pp. 229-230.

57. [1893] A.C. 38.

the disbursements incurred by the master. One vital element which distinguishes between the two cases is that in this case the defendant owners, F.W. Co., allowed N.M. Co. to hold themselves out as "managing owners" to the master. This fact would "place him in a position in which he was entitled to make disbursements and incur liabilities on account of the ship."<sup>58</sup> An issue to be raised is this. It is questionable whether the personal liability of the shipowners is a prerequisite. Nevertheless suppliers of necessities, who seek to take advantage of the master's lien, should first diligently ascertain whether or not there are circumstances or facts which will deprive the master of his lien.

A further observation should be made. Even if the memorandum signed by the master was not an equitable assignment, it came very close to it. It is submitted that C.B. Co. had for their own benefit complete control of the master's lien, unaffected by any settlement made behind their back. However, disbursement and wage liens suffer a common limitation. In The Petone,<sup>59</sup> Hill, J., held that persons, who without request paid off seamen's wages and master's disbursements, would not be entitled to the benefit of the lien because they acted as volunteers.

There is no reason to suppose that Australian courts would disregard the House of Lords decision in The "Sara" and their construction of section 10 of the Court of Admiralty Act 1861 (Imp.). Since the disbursement lien originated from the United Kingdom's statute, its application in Australia must be further considered in the light of Australian legislation.

A shocking gap in South Australian law was brought to light in

58. [1897] P. 226, p. 246.

59. [1917] P. 198. Cf. Williams and Bruce's Admiralty Practice (3rd ed. 1902), pp. 196-197 and MacLachlan on Merchant Shipping (5th ed. 1911), pp. 120-121. In their view, the maritime lien was created in favour of a master. The benefit of the lien was therefore created either by an assignment or agreement that the master was bound to bring an action for the creditors' benefit. See also Rhind v. The "Zita" (1924) Gaz. Law Rep. (N.Z.) 7.



The Louise Roth,<sup>60</sup> decided in 1905. The chief mate of a steamship had her arrested to enforce, inter alia, a claim for disbursements. They were incurred by him at the request of the master on account of the ship. It was held that in respect of such disbursements a mate had no maritime lien on the ship. The caution given by Supreme Court judge Gordon to masters and necessities men is noteworthy. He said:<sup>61</sup>

"...my examination of the authorities makes it clear to me that masters of ships registered in South Australia are under a very serious disadvantage...in as much as our law gives them no lien for disbursements on ship's account. When in 1889 the House of Lords in The "Sara" 14 App. Cas. 209...declared that masters had no lien for disbursements the Imperial Parliament at once passed legislation conferring the lien. This is now embodied in the Merchant Shipping Act, 1894, sec. 167, sub-sec. 2. But this part of the Merchant Shipping Act does not apply to South Australia, and our law is as it was in Great Britain before the legislation to which I have referred was passed."

It is heartening to note that following the above observation the South Australian Parliament passed the Marine Board and Navigation Further Amendment Act 1906 (S.A.).<sup>62</sup> Pursuant to section 736 of the 1894 Act (Imp.), it was reserved and the royal assent thereto was proclaimed. Thus the defect has been remedied by incorporating in this and subsequent legislation a provision similar to that in section 167 (2) of the 1894 Act (Imp.).

In Western Australia, the lacuna highlighted by Gordon, J., was forestalled by the Merchant Shipping Application Act 1903 (W.A.). Section 2 (1) extended as law of Western Australia Part II including the "disbursement lien" provision of the Merchant Shipping Act 1894 (Imp.). It applied to "British ships registered at, or trading with, or being at" any Western Australian port, and to the owners, masters and crews of ships when they were within the State's jurisdiction. The solution was not entirely satisfactory. Foreign ships, their owners and masters were outside its scope. Moreover, as we have seen, with the enactment of the Shipping Registration Act 1981 (Comth.),<sup>63</sup> British ships registered in Australia under the 1894 Imperial Act were transferred

60. [1905] S.A.L.R. 107.

61. Ibid., p. 112.

62. No. 917 of 1906, s. 6.

63. Came into force on January 26, 1982, supra.

to the new Australian Registry at Canberra. The defects would have remained had the Western Australian Marine Act 1948 not been passed, incorporating in section 144 (2) an aptly-worded provision.

We have seen that Tasmania and Victoria followed Western Australia by adopting the reception mechanism, with the accompanying shortcomings. Section 3 (1) of the Merchant Seamen Act 1935 (Tas.)<sup>64</sup> extends as part of the law of Tasmania the provisions of Part II of the 1894 Act (Imp.). By the Marine Acts (Vic.),<sup>65</sup> 1915 and 1958, only those provisions of the 1894 Act (Imp.) relating to ships' masters and seamen were imported into Victoria. However, with the repeal of the two Acts (Vic.) in 1961,<sup>66</sup> it appears that under Victorian State legislation a ship's master has no right of lien for disbursements or other liabilities incurred on account of the ship.

Like South Australia, Queensland dealt with the defect by enacting in section 48 of the Navigation Acts Amendment Act 1939 (Qld.) and in subsequent legislation<sup>67</sup> a "disbursement lien" provision similar to its English counterpart.

Probably, New South Wales, the premier State, was unwilling to follow the pattern set by the other States.

### 3. Commonwealth Legislation

Incapacitated Seamen and Masters. We have seen that the wages of seaman or master give rise to a maritime lien. The protection depends on the meaning given to the term "wages". Section 8 (1) of the Navigation Amendment Act 1981 (Comth.)<sup>68</sup> has narrowed the scope of Part II of the Navigation Act 1912-73 (Comth.) which deals with matters relating to masters and seamen. This Part will only apply to (i) ships registered in Australia; (ii) ships engaged in coasting trade; and (iii) non-Australian registered ships operated by Australian residents or companies and manned largely by Australian residents. It extends to the owners, masters and crew of such ships.<sup>69</sup>

64. See Chapter Three.

65. See s. 234 of each Act; supra.

66. Marine Amendment Act (Vic.) (No. 6847 of 1961), s. 9 (a).

67. Queensland Marine Act 1958, s. 77 (2).

68. No. 10 of 1981.

69. S. 10, as-amended by Navigation Act Amendment Act 1981 (Comth.), s. 8.

In the 1912-73 Act (Comth.), the word "wages" is defined as emoluments.<sup>70</sup> It was well pointed out by Sir Francis Jeune that the word is used in a broad sense. It includes not only what is received as a wage but also what is obtained in the course of the service as recompense in the execution of duty.<sup>71</sup> Pay for overtime work is part of the wages.

Section 132, which has given rise to much litigation, is a feature of the Navigation Act (Comth.). It is the foundation of the wage lien in many instances. Although a number of its ingredients came from the Imperial Acts, 1854<sup>72</sup> and 1894,<sup>73</sup> it has been amended to avoid ambiguity and make generous provision for the payment of wages to seamen who are left on shore sick or injured. When the Navigation Act 1912 (Comth.) was passed, the Commonwealth Parliament "intended that...the rights of the seamen should be reduced to certainty and not left to be determined in a conflict of whether his contractual relations with the ship were severed or not."<sup>74</sup> Thus section 132 provided for a seaman left on shore "in any manner authorized by law, by reason of illness or accident in the service of the ship" rendering him unfit for duties. He would be deemed to have been discharged from his ship. His wages would be payable till the end of his agreement, for a maximum period of three months. In 1921, the section was recast in that it no longer provided that the seaman should be deemed to be discharged from the ship.<sup>75</sup> The condition formerly applicable to illness was extended to illness, hurt or injury. By the amending Act of 1952 (Comth.), the uncertainties inherent in the expression "in any manner authorised by law" and the lack of correspondence between "illness and accident" and "illness, hurt or injury" were removed.<sup>76</sup>

70. S. 6 (1). For similar definition in Merchant Shipping Act 1894 (Imp.), see s. 742.

71. The Elmville (No. 2) [1904] P. 422.

72. See s. 209.

73. See s. 158, now replaced by Merchant Shipping Act 1970 (Imp.), s. 4.

74. *Per Isaac* in Bruhn v. Australian Steamships Pty. Ltd. (1922) 31 C.L.R. 136, pp. 141-142; cited by Kitto, J., in his dissenting judgment in Liosatos v. The Australian National Line (1964) 111 C.L.R. 282, at p. 296.

75. *Ibid.*, (1964) 111 C.L.R. 282, p. 298.

76. The section was substituted by provisions of an amending Act (No. 36 of 1958) but without any material alteration; see ss. 78-81.

Section 132 (1) reads:

"Where a seaman belonging to a ship registered in Australia or engaged in the coasting trade is left on shore at his proper return port by reason of illness, hurt or injury, he is...entitled to receive wages...in respect of each day ...commencing on the day on which he was left on shore and ending - (a) at the expiration of a period of one week after the date of the recovery; or (b) at the expiration of a period of three months after the day on which he was left on shore, whichever first occurs."

A seaman may in similar circumstances be left on shore at a port other than his proper return port. He is entitled to receive wages in respect of each day commencing on the day he was left on shore and ending -

- "(a) in a case in which he arrives at his proper port before his recovery -
  - (i) at the expiration of a period of one week after the date of his recovery; or
  - (ii) at the expiration of a period of three months after the date on which he so arrives, whichever first occurs; and
- (b) in a case in which he does not arrive at his proper return port before his recovery -
  - (i) when he arrives at his proper return port;
  - (ii) when he rejoins the ship; or
  - (iii) when he engages in other employment, whichever first occurs."

The case of Australian Steamships Pty. Ltd. v. Murphy<sup>78</sup> went on appeal to the High Court from a decision of the Supreme Court of Victoria. The dispute concerned a seaman's right to wages which in turn depended on the meaning of "recovery". While in the service of his ship at Devonport, the respondent seaman, whose home port was Melbourne, sustained serious leg injuries, incapacitating him from performing his duties. After being in Devonport for several months, he returned to Melbourne. There the respondent was examined by a medical attendant. Three or four months after the respondent's return, a

77. S. 132 (2). A seaman's entitlement to wages under s. 132 is extended to the master and the apprentice: s. 132 (4).

78. (1934) 50 C.L.R. 568.

certificate was issued to the effect that his leg had then made all the improvements it was likely to make and that he had a useful limb. The question was whether the time during which wages continued to be payable to the respondent ended before, or at the time of, the giving of the medical certificate. Under the then section 132 (1) (b), there was no time limit during which wages were payable. The High Court affirmed the judgment of Lowe, J., that the wages ran on after the medical certificate which did not constitute a certificate of recovery. A significant aspect of the judgment is the clear explanation given by Rich, Dixon, Evatt and McTiernan, J J., as follows:<sup>79</sup>

"The word 'recovery' appears to describe the attainment of a condition of health. If the illness or accidental injury is one which will leave a permanent bodily disability, defect, impairment or infirmity, the seaman has 'recovered' within the meaning of the provision when he has obtained his health and reached what will continue to be his normal condition. The word 'recovery' is neither scientific nor exact...Perhaps all that can be said is that the more immediate and remedial effects of his accident or illness must have gone, leaving him in such a state that, in common speech, he would be described as now well, or no longer ill."

Their Honours' description of what constitutes recovery is no substitute for the issue by a medical attendant of a certificate of recovery in unambiguous terms.

In Broken Hill Pty. Co. Ltd. v. Wanless,<sup>80</sup> the words "so far as can be ascertained, an illness contracted on board the ship or in the service of the ship" in section 132 (b) were construed and applied. The High Court had to decide whether a pre-employment condition in a seaman would necessarily disentitle him from receiving wages under section 132. During a voyage, a seaman (W) was found to be sick as a result of a myocardial infarction and was left on shore at Fremantle. W was believed to have had a coronary artery disease, as a pre-existing condition, which caused him no incapacity, and to have suffered from a myocardial infarction from which he had recovered. The reasoning applied by all five High Court Judges is an overt extension of

79. Ibid., p. 578.

80. (1972) A.L.J.R. 636.

legislative policy in favour of seamen. It appears that, in considering when and where an illness is contracted, the criterion to be followed is whether a seaman is incapacitated from performing his duties. The High Court unanimously held that the pre-existing artery disease, as a possible underlying cause of the myocardial infarction, will not prevent the sickness from falling within the description of "an illness contracted" within the meaning of section 132. Accordingly, the myocardial infarction was not regarded merely as a manifestation of heart disease previously contracted by W.

To the already generous provisions made for victims of accidents and illness is added a further element. The High Court decision in Liosatos v. The Australian National Line<sup>81</sup> will alleviate the consequences of certain health hazards, e.g. epidemics at a port of call and the handling of contaminated goods. Generally it is difficult to determine where, when or how an incapacitating illness is contracted. In terms of Australian shipping policy, the decision operates to protect the interests of seamen and masters who serve for reasonable periods of time in the same ship or possibly with the same company. The High Court heard, on appeal from the decision of the Supreme Court of South Australia, a claim hinged on the meaning of the expression "illness contracted on board the ship or in the service of the ship" in section 132 (6). By reason of illness or disease, the appellant seaman (L) was on 17th June, 1960, left ashore at Melbourne. This was not his proper return port. So far as could be ascertained, the illness or disease was contracted early in 1960, i.e. prior to the current articles were signed on 17th March, 1960. L had been in the service of the same ship, which was registered in Australia, and her owner from September, 1957, to June, 1960. Except for periods of annual and weekend leave on full pay, L had not been absent from the ship. The High Court found in favour of L, and reversed the Supreme Court decision. The benefits to long-serving seamen are seen in the broad meaning given by Barwick C.J., to section 132 in these words:<sup>82</sup>

"It is not in terms limited in its operation to incapacity resulting from illness, hurt or injury contracted or sustained during the currency of the articles under which

81. (1964) 111 C.L.R. 282.

82. Ibid., p. 291.

the seaman was serving when left on shore at other than his home port. It is enough that a seaman belonging to the ship should be left on shore incapacitated from an illness, hurt or injury contracted or sustained on board the ship or in the service of the ship or of the owner."

Chief Justice Barwick's emphasis on "seaman belonging to the ship" and the weight of authorities discussed show that a seaman may have served the ship, though not the owner. His wages in the sense considered above, when payable, will give rise to a lien on the ship. Accordingly, the change of owners of a ship in the course of his employment cannot affect his right under the section and his position as a lienee.

Another aspect of a seaman's protection comes from the words "service of the owner". It is submitted that the principle laid down in Liosatos v. The Australian National Line should equally avail a seaman whose injury or sickness is caused during his employment in any of his employer's ships. A seaman may be required to serve on different ships belonging to, or chartered by, the same person, or be assigned to other ships owned by companies of a group. It is questionable whether the total amount of wages due to him in respect of his employment with different ships would be secured by a single lien on just one ship. It is probable that, apart from proceeding in rem against each of the ships to which a wage lien has attached, a seaman may not be able to recover his wages in full. The reason is that the lien on the ship proceeded against does extend to all the wages due.

Ranking of Wage and Disbursement Liens. Like the 1894 Imperial Act,<sup>83</sup> the Commonwealth legislation<sup>84</sup> prohibits any seaman or apprentice by any agreement from forfeiting his lien on the ship for his wages. The Commonwealth Parliament, however, has moved one step further. By an extraordinary provision, which has no precedent in the legislation of any British Commonwealth country, the lien for seamen's and apprentices' wages is given priority over all other liens.<sup>85</sup>

83. S. 156, now replaced by Merchant Shipping Act 1970 (Imp.), s. 16.

84. Navigation Act 1912-73, s. 83 (1) (b).

85. Ibid., s. 83 (2). S. 83 (3) strikes down any contractual stipulation which contravenes any provision of the Act. S. 85 (6) defines "wages" to include such allowances as are prescribed. However, the position of holders of maritime liens for wages and disbursements will apparently be prejudiced if Draft Admiralty Bill 1985, clause 37 (5) is implemented as Commonwealth law.

It highlights the Commonwealth Parliament's policy of conferring maximum protection on wage claims.

Section 94 (1) of the Navigation Act 1912-73 (Comth.) provides that a ship's master has, so far as the case permits, "the same rights, liens and remedies for the recovery of his wages as a seaman has by law or custom." This subsection reproduced verbatim the repealed section 167 (1) of the 1894 Act (Imp.). In the recent case of The Royal Wells,<sup>86</sup> Sheen, J.'s enlightening judgment has placed the lien for master's wages on par with that for seaman's wages. In his view, there are no just grounds today for maintaining the nineteenth-century rule that wage claims of seamen should enjoy priority over similar claims of masters. He held that, since a master is today not personally liable to the crew for their wages, the whole foundation of the decision in The Salacia<sup>87</sup> had been removed. In modern shipping practice and under Australian law, the ship's master, officers and crew are all employees of the shipowner or the demise charterer. There is no just ground for holding that a master's wage claim should rank after the wage claims of the crew.

Naturally, the first priority given to the wage lien will adversely affect the rights of the other claimants, e.g. the salvors, mortgagees, holders of bottomry bond and necessities men. Section 83 (2) and section 94 (1) offer one vital advantage to shipowners who are unable

86. [1984] 3 All E.R. 193.

87. (1862) 167 E.R. 246. The rule that seamen's claims for wages had priority over master's wages and disbursements was actually applied, before the Navigation Act 1912 (Comth.) was passed, in two New South Wales cases: The Anglo-Indian, (1868) 8 N.S.W.L.R. 102; The Tyburnia (1887) 4 W.N. (N.S.W.) 1. This preferential treatment was based on the premise that the ship's master was by law regarded as being liable to the seamen for their wages. Where the proceeds of sale of the ship were insufficient to pay seamen's wages, the master was not permitted to deplete the fund further by taking a portion out of it to meet his own claim.



to pay the crews' wages promptly. In view of their first-priority lien on the ship, masters and crew members may readily render their services on credit by looking to the ship as security. There is apparently another benefit to shipowners. A wage lien constitutes a secret charge on the ship. The need to carry out careful investigations beforehand will deter a prospective plaintiff, other than a seaman or master, from taking proceedings in rem against ships to which section 10 of the Navigation Act 1912-73 (Comth.) applies. Otherwise the action may prove unproductive.

To the dismay of other creditors, the security value of ships under Commonwealth law is reduced by yet another first-priority lien. Section 94 (2) reads:

"The master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements and liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages."

The provision, when read in conjunction with section 94 (1) and section 83 (2), confers on a ship's master a disbursement lien which ranks on par with a seaman's wage lien. By upgrading the order of priority of the disbursement lien, the Commonwealth Parliament has, in one important way, increased the security value of ships defined in section 10. Thus a master should be able to obtain, without difficulty, essential supplies and services on account of the ship. Where a master is personally liable to third parties in such circumstances, e.g. under bills of exchange which are dishonoured by the shipowners, the creditors may avail themselves of the master's disbursement lien. It is submitted that with the master's consent they can, in his name and on his behalf, institute proceedings in rem against the ship.<sup>88</sup> Where the relevant provisions of the Navigation Act 1912-73 (Comth.) apply as the proper law in a conflict of laws situation, it is immaterial that the disbursements are incurred outside Australia and the action in rem is instituted in a foreign court.

88. See The Ripon City [1897] P. 226.

### III. SALVAGE LIEN

#### 1. Origin

It is not certain how this lien began. The origin of a salvor's right is generally thought to have been based on the Roman concept of negotiorum gestio. A negotiorum gestor was one who had done something, e.g. saving some property, for another without being asked.<sup>89</sup> Where the intervention was reasonable, he was entitled to be reimbursed. But Roman law in its wider field did not entitle such a person to claim any reward.<sup>90</sup>

In the early case of Hartford v. Jones, decided probably in 1699,<sup>91</sup> an action for trover was brought against the defendant. After having saved the goods from being lost, he refused to part with them until he was paid. Holt, C.J., gave judgment for the defendant on the grounds that "salvage is allowed by all nations; it being reasonable, that a man shall be rewarded who hazards his life in the service of another." Thus at common law, a salvor had a possessory lien on the goods saved. About four years later in Tranter v. Watson,<sup>92</sup> Holt, C.J., went one step further. He held that the custom and law of nations "gives the master in this case an interest in the ship and goods."<sup>93</sup> In his view this interest, in the sense of security, could not be divested even though the master had parted with his possession. This case contained an early trace of a lien independent of possession.

It is unknown when the English Court of Admiralty first recognised the maritime lien in favour of a salvor. The lien could have

89. W.A. Hunter, Roman Law (2nd ed. 1885), p. 661; Jolowicz, Historical Introduction to Roman Law (1967), p. 312.

90. W.W., Buckland and A.R. McNair, Roman Law and Common Law (1936), pp. 259-260.

91. 2 Salkeld 654; 1 Ld. Raym. 393.

92. (1703) 2 Ld. Raym. 931.

93. Ibid., 933. For concept of salvage, see also "Life Salvage in Anglo-American Law" (1978) 10 J.M.L.C. 79.

arisen from the notional hypothecation to the salvor of the property saved. There are a number of other reasons which led to the development of the principle. The inconvenience to the owner of allowing a salvor retain possession of the property salvaged had to be avoided.<sup>94</sup> Otherwise it might defeat the purpose of the salvage work undertaken. Public policy has been repeatedly emphasised as the premise on which salvors are to be encouraged and especially rewarded for the hazardous nature of their work. Further impetus came from a series of Acts which provided for salvage rewards.<sup>95</sup> It is submitted that the circumstances outlined by John Mansfield are more related to the creation of a lien for salvage than to any other claim. He wrote:<sup>96</sup>

"Proceeding to generalise, it appears that in every case of maritime lien we will find the circumstances in which it arose, the inaccessibility in general of the owner of the property subject to the lien, coupled with two at least of the following elements, namely, necessity, emergency, some ground of public policy justifying the lien."

In the "Two Friends", decided in 1799, the Court of Admiralty gave judgment for the salvage claims of the crew of an American ship. They recaptured her from the enemy. Sir W. Scott made an unambiguous reference to the maritime lien when he said:<sup>97</sup>

"...every person assisting in rescue has a lien on the thing saved. He has, as it has been argued, an action in personam also; but his first and his proper remedy is in rem; and his having the one is no argument against his title to the other."

The earlier proposition applied by Holt, C.J., which distinguished between the master's interest and possession was reiterated. Lord Stowell in "Eleanora Charlotta",<sup>98</sup> decided in 1823, made it clear that in

94. Salvors have, as an alternative remedy, a possessory lien on the thing salvaged while it remains in their possession: Hartford v. Jones (1699) 1 Ld. Rym. 393. In The Tubantia [1924] P. 78 an injunction was granted to protect a salvor's right of possession against interference by rival salvors.

95. (1713) 12 Anne St. 2, c. 18, s. 2, giving reasonable rewards to salvors; (1809) 49 Geo. III, c. 122, ss. 4-9, (1846) 9 & 10 Vic., c. 99, consolidating and amending the law on salvage.

96. "Maritime Liens" (1888) 4 L.Q.R. 379, p. 391.

97. 1 C. Rob. 271, 277.

98. 1 Hagg. 156.

order for salvors to maintain their rights it was totally unnecessary for them to retain possession by remaining on the vessel salvaged. Thus under English law the modern aspect of maritime lien for salvage had emerged.

It is reasonable to presume that the salvage lien was part of the law received into Australia under the Australian Courts Act 1828 (Imp.).<sup>99</sup> A number of State Supreme Court and High Court of Australia decisions have directly adopted the principles of English salvage law.<sup>1</sup> In terms of the Navigation Act 1912-1973 (Comth.), the Commonwealth Legislature has recognised the existence of the lien for salvage services. By section 324 (1), a salvor may abandon his lien upon the wreck alleged to be salvaged. It has its origin in section 554 (1) of the Imperial Act 1894.<sup>2</sup> Moreover, subject to the proviso, section 396 (1) of the Navigation Act 1912-73 (Comth.) bars the enforcement of any salvage claim or lien against a vessel, her cargo and/or freight unless the action in rem is brought within two years from the date when the salvage services were rendered. This provision is modelled on section 8 of the Maritime Conventions Act 1911 (U.K.). It is surprising that so far only the legislatures of New South Wales and Tasmania have given statutory effect to the internationally-accepted provision.<sup>3</sup> In this respect, the laws of the other States differ.

## 2. Basic Requirements

As the salvage lien is based on a salvor's right to reward, it is essential to analyse the conditions that must first be met. With minor exceptions, the body of rules on the topic developed by Australian courts is mainly of recent origin.

Property. Salvage claims can only arise in connection with a narrow class of so-called "maritime property". This means a ship, cargo, freight or any part thereof salvaged. Section 6 (1) of the Navigation Act 1912-73 (Comth.) defines a ship as "a vessel not ordinarily

99. The difficulty, however, is that before the Supreme Court (Admiralty) Act 1832 (Imp.) was passed, it was doubtful that the lien could be enforced in a colonial court.

1. These will be discussed in the following pages.
2. Unfortunately the wording of both the Commonwealth and Imperial provisions is insufficiently clear.
3. Limitation Act 1969 (N.S.W.), s. 22 (3) and Limitation Act 1974 (Tas.), s. 8 (3).

propelled by oars only." Sailing boats and barges may be navigated without the use of oars and are therefore within the definition. Subject to certain exceptions, wrecks<sup>4</sup> and the remnants of damaged or sunken vessels may still be the subject of salvage claims. Mr. Justice Story, a well known American judge, held that "the wages recoverable in cases of shipwreck are recovered in the nature of salvage, and as such from a lien on the property salvaged."<sup>5</sup> In the Queensland case of "The Gothenburg",<sup>6</sup> the Privy Council applied the ordinary rules of salvage to a claim in respect of a derelict.

The word "ship" has been held not to include a beacon or similar object. In The Gas Float Whiddon (No. 2)<sup>7</sup> a lightship was intended to be moored in tidal waters with her light lit at night as a navigation aid. It broke away from its moorings while being towed in the Thames, and was later recovered. It was held that, as the vessel was not maritime property, no salvage reward was payable. It was not constructed for the purpose of being navigated or of carrying cargo or passengers. It was in truth a lighted buoy. The argument that the gas in the float could be regarded as cargo carried by it was rejected. Naturally where human life and maritime property are together salvaged, the lien for salvage reward will attach to the latter.<sup>8</sup>

Danger. In all salvage claims, danger is an essential element. The nature and degree required can only be gathered from an analysis of the case authorities. Until recently, danger has been viewed mainly in terms of the likelihood of damage or injury to, or loss, destruction or deprivation of, the property. Emphasis has been placed on physical danger. It may arise from the position or condition of the vessel salvaged, the incapacity or shortage of crew, the master's

4. For definition, see s. 294.

5. Frothingham v. Prince 3 Mass. Rep. 563; see also Phillipps on Insurance (Boston 1823), p. 163.

6. (1875) 4 Q.S.C.R. 133.

7. [1896] P. 42. (C.A.); see R.G. Marsden, "Admiralty Droits and Salvage - Gas Float Whitton, No. II" (1899) 60 L.Q.R. 353.

8. Bligh v. Simpson, The Fusilier (1865) 3 Moo. P.C.C.N. 51.

want of skill or ignorance of the locality, or from capture by enemy or pirates. The giving of distress signals or acceptance of help by those on board the vessel salvaged may be evidence of the presence of danger. Dr. Lushington's classic description of danger in The Charlotte<sup>9</sup> must be understood in the physical sense. He explained:

"It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might probably expose her to destruction if the services are not rendered."

In two modern cases, namely, The Glaucus<sup>10</sup> and The Troilus,<sup>11</sup> English judges have been much influenced by economic factors. The question of danger to a ship in terms of both physical danger or destruction and the loss of the ship's use to her owners was considered. In both cases, the ships were towed to Aden in a disabled condition and without motive power. As they could not be repaired at Aden, they were towed to ports where the repairs could be done. In The Glaucus, Willmer, J., held that the ship, while at Aden, was in a position of danger.<sup>12</sup> Apart from the physical danger, he seemed to regard the loss of use of a highly valuable chattel due to immobilization as an important factor. The decision was followed in The Troilus, but unfortunately reliance was placed upon the state of possible physical danger to the ship rather than upon the deprivation of her use.

On appeal, the trial court decision in The Troilus was affirmed.<sup>13</sup> Both Bucknill and Somerville, L.J.J., were persuaded by the arguments in favour of the two-stage salvage services, *i.e.* salvage when the ship was towed to Aden and from there to the port for repairs. In dealing with the question of safety of the ship at the intermediate place, *i.e.* Aden, Somerville, L.J., appeared to have in mind the availability to her owners of the ship as a revenue-earning chattel. He

9. (1848) 3 Wm. Rob. 68, 71.

10. (1948) 81 Ll. L. Rep. 262.

11. [1951] A.C. 820 (H.L.).

12. (1948) 81 Ll. L. Rep. 262, 266.

13. [1950] P. 92 (C.A.).

ably pointed out that<sup>14</sup> "a disabled vessel at a temporary resting place en route, where she cannot be repaired, is still valueless where she is although there may be a safe anchorage for her...." According to him, the distress caused by the original accident continued in the sense that "she cannot without assistance traverse the high seas to her destination or some port of repair."<sup>15</sup>

The appeal brought by cargo owners to the House of Lords was unanimously dismissed. Lord Porter, who delivered the single judgment, emphasised the importance of considering danger from the viewpoint of possible economic loss to the owners of the cargo carried and the ship. He said:<sup>16</sup>

"Of course, if no salvage award is permissible when once the damaged vessel has reached some place where she can lie for an indefinite period in physical safety...the ship must lie deteriorating and the cargo ultimately perishing, cadit quaestio. But I do not accept that view. The master whose ship has suffered damage must do his best to preserve the ship and cargo and to bring both to their destination as cheaply and efficiently as possible. The possibility of expense and the effect of delay upon both the ship and cargo must be borne in mind...The possibility of repair at convenient ports and the time involved and safety of operation to ship and cargo must be borne in mind. The answer, in my view, is not the simple one - 'Is the ship in a position of physical safety?'"

From the financial viewpoint, the wide meaning given to "danger" meets the needs and objectives of maritime ventures. It also serves to fill a serious gap in salvage law.

In Australia, the historic decision in the Oceanic Grandeur case<sup>17</sup> has brought the concept of danger into line with recent developments in Britain and America. A tanker carrying over 55,000 tons of crude oil struck a rock in the Torres Straits, damaging her tanks and losing a large quantity of her oil cargo. She listed to port and part

14. Ibid., p. 110.

15. Ibid., p. 110.

16. [1951] A.C. 820, p. 834.

17. Fisher and Others v. The Ship "Ocean Grandeur"; Roberts and Others v. The Ship "Ocean Grandeur" [1972-73] A.L.R. 948, heard in the High Court of Australia exercising original jurisdiction.

of her deck was awash. But she came to anchor later in shallow water and was not sinking. The vessel, Leslie J. Thompson, went alongside the Oceanic Grandeur. At some peril to herself and after great exertions by her crew, she engaged in a complex transshipment operation, removing a large part of Oceanic Grandeur's cargo, raising her bows and correcting her list. Moreover, the very ingenious and arduous method adopted and executed by the officers of the Leslie J. Thompson enabled divers to carry out temporary repairs to the hull. The Oceanic Grandeur later sailed for Singapore where permanent repairs were done.

Stephen, J., reviewed various Australian, English and American authorities on the subject.<sup>18</sup> He found, as an alternative ground, that loss of use of the vessel to her owners as a result of being immobilized at where she lay presented the necessary danger. Undoubtedly, his Honour took cognizance of the deprivation of her gainful employment as a tanker and the continuing leakage of her cargo, as important economic factors which constituted the danger.

We have seen the devastating pollution damage that can arise from spillage into the sea of oil and noxious substances. The huge costs of clean-up operations and the severe civil and criminal liability imposed by law will have crippling effects on shipowners.<sup>19</sup> The consequences can be more disastrous than losing the ship together with her cargo on board. Suppose that a salvor succeeds in averting a mammoth pollution disaster by towing a tanker from a dangerous position out to sea and causing her oil cargo to be dumped far from the shore. It is virtually certain that, for the preventive services rendered, he does not have a lien on the tanker. This unfortunate result is due to the narrow meaning given to certain aspects of salvage law. The pollution damage and statutory liability averted are not maritime property. Moreover, the threat of pollution by oil or

18. He was influenced by the fact that in American and English decisions the concept of deprivation in terms of her use for earning purposes has been recognised: ibid, p. 953; The National Defender [1970] 1 Lloyd's Rep. 40, p. 44 (Southern District Court of New York); The Troilus [1951] A.C. 820, p. 834, per Lord Porter.

19. See Chapter Five.



other noxious substances is, in essence, different from the danger as defined in salvage law. If the reasoning is correct, this area of the law should, as a matter of public policy, be urgently amended by legislation. Handsome salvage rewards giving rise to a maritime lien on the ship and cargo involved should be provided to encourage preventive measures to be taken to avoid pollution damage.

Voluntary nature of service. According to Lord Stowell, a salvor is a "person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship...."<sup>20</sup> Inherent in this classic definition is voluntariness as a long-recognised requirement under English law. This element was considered in the New South Wales case of The Fire Brigade v. The Elderslie Steamship Co.<sup>21</sup> In response to request, a fire brigade extinguished a fire which occurred on board the "Buteshire". At the time, she was lying moored to a wharf at Port Jackson and outside the area of responsibility of the fire brigade. There was no danger of the fire spreading to the wharf or the adjacent buildings. Owen, J., held that the services rendered to the "Buteshire" were outside the sphere of the fire brigade's duties. Reliance was placed on a statement in Williams and Bruce's Admiralty Practice: "If, however, they go beyond the limits of their official duty in giving extraordinary assistance, they are entitled to be considered as salvors."<sup>22</sup>

Voluntariness as an element of salvage law is founded on public policy. The moral aspect is well brought out by Lord Stowell in The Waterloo as follows: "It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it."<sup>23</sup> By far the crucial implication of public policy is the basic distinction drawn between two types of service rendered by a seaman or master. They are service which falls within the original contract made with

20. The Neptune (1824) 1 Hag. Adm. 227, 236.

21. (1899) 14 W.N. (N.S.W.) 320.

22. (2nd ed. 1886), p. 129.

23. 2 Dod. 437, 443, cited with approval by Mellish, L.J., in delivering the Privy Council judgment in The "Sappho" (1871) L.R. 3 P.C. 690, p. 694.

the shipowner, as employer, and extraordinary service. In holding that only a volunteer salvor is entitled to salvage remuneration, the courts have acted as the guardian of the extra-contractual rights of seamen.

Ignorance as to the ownership of the vessel rescued does not alter the character of the services rendered. In The "Sappho",<sup>24</sup> a screw steamer S, which became disabled in very bad weather, accepted salvage services provided by another screw steamer N under an arrangement. It was unknown at the time that both ships belonged to the same owners. The Privy Council held that as the services rendered were of extraordinary nature, and therefore not within their ordinary contracts, both the master and crew of the ship N were entitled to salvage. An important rule laid down is that neither the mistaken arrangement nor the common ownership of the vessels will preclude such entitlement.

The freedom of salvors to resort to a court of law for determining the value of the services rendered cannot be fettered by pre-existing agreements made by third parties. In The Magery,<sup>25</sup> the owners of two fishing vessels, M and F, and their vessels were by the rules of their respective clubs bound to render assistance to each other. They also provided that the price to be paid for such assistance was to be determined by a particular type of arbitration. On appeal to the Divisional Court, the trial court decision was upheld. The master and crew of the salving vessel, who were not parties and had not assented to the club rules, were not bound by them. One issue raised was whether such an agreement, even if assented to by the crew members, would not be against public policy.

An interesting question is this. How far are courts prepared to go in order to safeguard the independent rights of the master and seamen based on the concept of voluntariness? Judicial readiness to reward volunteer adventurers for their diligence and prompt response to a distress call is seen in the case of The Friesland.<sup>26</sup> The

24. [1871] L.R. 3 P.C. 690.

25. [1902] P. 157.

26. [1904] P. 345.

owners of The Friesland, with a broken shaft and lying in a position of danger, agreed with the tug owners that their broken-down vessel should be towed to Liverpool under the usual towage terms. Before the master of the tug received instructions from its owners and became aware of any such towage agreement being made, he had arranged with the master of The Friesland to provide salvage service. The order of events showed that the tug started out independently of advice or orders to perform the service and had got up to The Friesland when the towage agreement between the respective owners were made. Sir F.H. Jeune held that the salvage work had commenced, giving rise to independent rights.<sup>27</sup> "[T]he owners cannot bargain away the vested rights of the master and crew by a bargain in which the master and crew do not acquiesce."<sup>28</sup>

The concept of voluntariness was applied to distinguish the independent rights of the master from those of the crew. In The Britain,<sup>29</sup> Dr. Lushington held that the master of the salving vessel could, by agreement made with the owner of the salved vessel, only bind the interest of himself and his owner. Consequently, such an agreement is not binding on the rest of the crew if made without their sanction and concurrence.

In Australia, there are two High Court decisions where voluntariness, as an aspect of public policy and requirement of salvage law, is rendered obscure. It is submitted that where services are provided, as stated in a towage contract, no salvage is payable and hence no salvage lien will attach to the property preserved.

In The Cartela v. The Inverness-Shire,<sup>30</sup> the Tasmanian Government paid the owners of The Cartela the sum of twenty five pounds to proceed to the assistance of a vessel in distress. The master of The Cartela was informed of the services to be provided but not the terms of the contract made between the owners of the two vessels

27. He followed the decision of Phillimore J., in The Inchmaree [1899] P. 111 that shipowners cannot by agreement bind the master and crew in respect of salvage services already rendered.

28. [1904] P. 345, p. 351.

29. (1839) 1 Wm. Rob. 40. Cf. The Nasmyth (1885) 10 P.D. 41.

30. (1916) 21 C.L.R. 387.

and the Government. It was agreed between the masters of the two vessels that The Cartela would tow the Inverness-Shire for the sum of £500. If The Cartela had been on an independent voyage and fallen in with The Inverness-Shire, all the necessary conditions would have been present rendering the towage a salvage service. The change of weather and other circumstances necessitated services of a much more onerous nature than those within the contemplation of the parties when the towage contract for the sum of twenty-five pounds was made. The owners, master and crew of The Cartela brought an action against The Inverness-Shire for £500, or alternatively for salvage. In the Supreme Court of Tasmania, judgment was given for the defendants on the ground that nothing occurred during the towage operation to change the character of the services from towage to salvage. On appeal to the High Court, it was held that the plaintiffs were entitled to an additional remuneration of £175 to be distributed as follows: one hundred pounds to the owners and the balance to the master and crew.

It is regretted that the opportunity was not seized upon to clarify the principles on which the distributions were made. With the exception of Isaac, J., Griffith, C.J., Barton and Rich, J.J., seemed content to let the vagueness remain when they said:<sup>31</sup>

"[I]t is immaterial whether the larger remuneration is regarded as towage or as salvage...The extra services rendered are analogous to salvage in this respect - that they do not depend upon express contract but upon a liability imposed by maritime law...."

Isaac, J., differed entirely from the view of the majority with regard to the fundamental rules of admiralty law applicable to the case. In emphasising that salvage is "a mixed question of private right and public policy," he correctly re-stated voluntariness as an essential element of salvage law. He was firmly of the view that the compensation allowed should be on a salvage basis.

Uncertainty as to the grounds of the majority decision could have influenced the outcome of a later case. In Huddart Parker Ltd. v. The Ship Mill Hill and Her Cargo; Master and Crew of the Tug Foremost v. The Ship Mill Hill and Her Cargo,<sup>32</sup> an agreement was signed

31. *Ibid.*, p. 396.

32. (1950) 81 C.L.R. 502.

between the plaintiff owners of a tug Foremost and the agents of the owners of the ship Mill Hill, her cargo and freight. By it, the tug would get a salvage reward if the ship was salvaged, or be paid a hire if the efforts failed. The Mill Hill was safely towed into Port Lincoln in Spencer Gulf. In the admiralty proceedings that followed, the master and crew of the tug contended that the agreement did not prejudice their right to maintain a suit for salvage. It is probable that the somewhat narrow meaning given to, and the apparent disregard of, the concept of voluntariness are due to Dixon J.'s misreading of the English authorities. His proposition, if accepted at face value, will seriously undermine the position of masters and seamen seeking to enforce their independent rights. He said:<sup>33</sup>

"In the present case I think that in circumstances that existed on the evening of Saturday, 19th August 1950, it was competent to the owners of the tug to make an agreement for her to render assistance and thereby to bind the master and crew as to the character and amount of the reward."

It is submitted that this decision can only be reconciled with the mainstream of authorities in one of two ways. Presumably, being employees of a company which operated a tug for salvage and towage purposes, their contract of employment would empower the company to render its services to other shipowners on terms which bound them. Alternatively, in return for the special rates of remuneration and other benefits, their duties could have been so widely defined that the salvage services provided were within the ordinary contract of employment. Apart from such possibility, it is nowhere mentioned in the judgment that the master and crew of the tug had verbally consented to the agreement beforehand.

The independent rights of the owners of vessels carrying out rescue operations are inextricably related to those of the master and seamen. The decision in Fisher and Others v. The Ship "Oceanic Grandeur"; Roberts and Others v. The Ship "Oceanic Grandeur"<sup>34</sup> is a welcome rectification of the judicial misconceptions. Stephen, J., sitting as Judge of the High Court of first instance, did not regard as important the physical character of the particular services, e.g.

33. Ibid., p. 511.

34. [1972-73] A.L.R. 948.

lightening, towage or salvage services, but rather the circumstances under which they were carried out. His penetrating analysis of the various authorities has helped to resolve the confusion involving salvage and other services. To qualify as salvage, the work carried out must, inter alia, be (a) outside the pre-existing contract to lighten or tow the ship in distress, and (ii) rendered necessary under the circumstances to avoid the risk of danger to her. The test to be applied is not original but a refined version of the proposition laid down by the Privy Council in The Minnehaha. Lord Kingdown said:<sup>35</sup>

"But if in the discharge of this task (towage contract), by a sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagements, she... may claim as salvor...."

Stephen, J., has correctly enunciated the underlying principle. Provided the necessary elements of salvage are involved, the services rendered in the form of lightening, towing or other maritime operation will give rise to salvage reward. In determining the nature of the rescue operation or work carried out, courts tend not to be swayed by the name or description used by the parties involved. Lord Blackburn in Nicholson v. Leth Salvage and Towage Co. Ltd.<sup>36</sup> highlighted this aspect of salvage law when he said: "[I]n many cases of pure salvage nothing more is required than towage services." The tug-owner providing such services will therefore be entitled to a maritime lien on the ship towed.

In the New South Wales case of The Steamship MacGregor-Hes- elton's Claim,<sup>37</sup> the vessel was under charter when towage was rendered necessary by her condition or perilous position. Sir James Martin, C.J., (Judge Commissary) held that, as the court had jurisdiction over the proceedings in rem for towage, a claim for towage gave rise to a maritime lien. However, as the facts show that the services on both occasions were rendered under towage contracts, it is submitted that the essential element of voluntariness was absent. In the

35. (1861) Lush. 335, 347.

36. [1923] S.L.T. 229, p. 231, cited with approval in Fisher and Others v. The Ship "Ocean Grandeur"; Roberts and Others v. The Ship "Ocean Grandeur" [1972-73] A.L.R. 948, p. 957.

37. (1876) 14 N.S.W.L.R. 107.

light of the preceding analysis, the decision cannot be supported.

Successful services. No salvage reward is payable for any attempt made to rescue life or property at sea unless some maritime property, e.g. ship, cargo or freight, is ultimately saved.

Where no property is saved, salvage law does not allow a claim for life salvage to attach to the damages recovered. In The Annie,<sup>38</sup> the vessel A was negligently sunk in the River Thames by the vessel R. The master and crew of the former vessel were picked up by the tug S (the salvors). Full compensation for the vessel A and the cargo sunk was recovered from the owners of vessel R. The wreck was later raised by the conservators and sold. It was held that the salvors were not entitled to reward for life salvage. As their services had only resulted in the saving of lives, they had no maritime lien on the compensation recovered and the wreck. To encourage the saving of lives as a public policy, the Commonwealth Parliament has adopted the incentives provided by Imperial legislation.<sup>39</sup> Thus where no property is saved or the property saved is of insufficient value, the Minister may at his discretion pay life salvors out of moneys appropriated by the Parliament such sum as he thinks fit.<sup>40</sup>

Property that is successfully preserved may be subject to claims relating to life salvage and property salvage. One unfortunate consequence is that, irrespective of whether the property saved belongs to the shipowners or to third parties, the application of the rule could exhaust its entire value. In The Cargo Ex Sarpedon,<sup>41</sup> an English steamship, which had been severely damaged in a collision with another vessel, was abandoned. A Spanish steamship took on board from the English steamship her passengers, master, crew and part of her cargo, and landed them safely at an English port. In the admiralty proceedings which followed, the cargo which was arrested was held liable to pay salvage reward for the preservation of lives and the property. The prayer of the cargo-owners that they ought

38. (1886) 12 P.D. 50.

39. Merchant Shipping Act 1894 (Imp.), s. 544 (3).

40. Navigation Act 1912-73 (Comth.), s. 315 (2).

41. (1877) 3 P.D. 28.

to be recouped by the owners of the English steamship in respect of the salvage remuneration paid for the lives saved was rejected. It is submitted that the salvors' lien on the property saved will extend to the claim for life salvage.

By section 315 (1) of the Navigation Act 1912-73 (Comth.), where services are rendered within Australian waters in saving life or elsewhere in saving life from any Australian-registered ship, a reasonable amount of salvage is payable by the shipowner if property belonging to him is also salvaged.<sup>42</sup> In such a case, the salvage reward for preservation of life is payable in priority to all other salvage claims.

The principle that salvage is payable where some property is saved is subject to a number of important exceptions. They were outlined by Dr. Lushington in The Cape Packet.<sup>43</sup> First, if neglect or misconduct on the part of salvors is wilful, there could be a forfeiture of the whole salvage remuneration. Second, if there is "gross negligence", apart from wilful inattention, the claim might also be wholly debarred. In these situations, despite their successful preservation of property, salvors can maintain neither a personal action against its owners nor an admiralty action in rem against the property salvaged. There is, however, "another kind of negligence, the effect of which is to diminish the amount of salvage reward, not to take it entirely away."<sup>44</sup> This concept was adhered to in The Magdalen.<sup>45</sup> Some damage was caused by the second set of salvors as a result of an error. They received less than they would otherwise have been awarded. Dr. Lushington explained that the reduction was made to indemnify the owners and not for the purpose of punishing the salvors.

In The Tojo Maru,<sup>46</sup> their Lordships' decision not to limit the consequences of negligence has added a new exception to the principle. Before gas from the adjoining tank was removed, a salvor

42. Like its Imperial counterpart, s. 315 (1) does not, in the absence of an agreement, impose on shipowners a liability to pay salvors for the preservation of life unless their ship or part thereof has also been salvaged. See also The Aid (1822), 1 Hag. Adm. 83 and Bligh v. Simpson, The Fusilier (1865), 3 Moo. P.C.C.N.S. 51.

43. (1848) 3 W. Rob. 122.

44. Ibid., 125.

45. (1861) 5 L.T. 807.

46. [1971] 1 All E.R. 1110 (H.L.).



began covering an aperture in a tanker caused by a collision. He attempted bolting a wide plate into place by using a bolt gun. The bolting resulted in an explosion which caused extensive damage to the tanker. The rights of salvors whose services were successful were examined in relation to those of the owners of the tanker which was negligently damaged. It was held that there is no rule of maritime law that, where a salvage operation has been successful or where the salvors have achieved more good than harm, the owners of the salvaged vessel are precluded from holding the salvors liable for negligence. In the owners' counterclaim for negligent damage, they were not restricted to a right to offset that loss against the amount of the salvage award. It is obvious that where the damages recoverable by a property owner equal to or exceed the salvage award, salvors have no maritime lien on the property. Consequently, salvors may be held liable for damages for wrongful arrest of the property.

The principle, which gives rise to salvage entitlement, also applies where any act done or step taken has contributed to success. Sir John Coleridge, in delivering the Privy Council judgment in The Atlas, explained:<sup>47</sup>

"...where a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share of the reward, although the part they took, standing by itself, would not in fact have produced it."

As a matter of public policy, courts tend to treat with sympathy salvage efforts, though they have only indirectly contributed to success. In the Supreme Court of New South Wales case of The Cythera,<sup>48</sup> a yacht was stolen from her owners. After making several unsuccessful attempts to take possession of the yacht, the cargo ship CM collided with her. Ultimately, a government launch was arranged to go out and collect the yacht, this being made possible by the presence of the cargo ship CM. In the admiralty proceedings brought against the yacht and her cargo, judgment was given for the cargo-

47. (1862) Lush. 518, 528, distinguished by House of Lords in The Tojo Maru [1971] 1 All. E.R. 1110.

48. [1965] N.S.W.R. 146.

ship owners, as salvors. Macfarlan, J., commented favourably on the part played by the cargo ship CM, resulting in the formal action of boarding the yacht. He said:<sup>49</sup>

"It is not necessary...that positive acts actually on or directly in relation to the salvaged vessel shall be done by the salvor; it is sufficient if the salvor, by standing by, enables acts to be done by other persons or ships which, if the salvor had not stood by, would not have been done."

The proposition is commendable in that it recognizes for salvage reward indirect assistance or even the passive role of salvors.

In Kennedy on Civil Salvage, the proposition is carried one step further. It gives, as an "exceptional class of cases", instances where salvage remuneration was given for services even though they had not contributed to the ultimate preservation of the property. The learned author justified the award on the ground that the services were rendered on request or were "engaged" or "employed".<sup>50</sup> It is not easy to reconcile this category of cases with the general principles. In Owners of S.S. Melanie v. Owners of S.S. San Onofre,<sup>51</sup> Viscount Cave, L.C., said that cases "where the claim was not for salvage but for payment for work done on request, stand of course on a different footing." However, the courts are generally unwilling to suffer acts of assistance go unrewarded where they have contributed to the ultimate preservation of the property. It appears that the absence of a logical link between the services rendered and the property saved should prevent a maritime lien from arising.

### 3. Statutory Intervention

A number of aspects of salvage law have been subject to legislative regulation. The statutory effect on the rights and position of salvors merits consideration.

Merchant Shipping and Navigation Acts. We have seen how public policy and the courts have stopped attempts by shipowners to whittle down the rights of salvors. Moreover, to prevent unjust exploitation of seamen, the Imperial Parliament stepped in. By section

49. Ibid., 154.

50. By Kenneth C. McGuffie (14th ed. 1958), pp. 112-119.

51. [1925] A.C. 246 (H.L.).

182 of the Merchant Shipping Act 1854 (Imp.), every agreement by a seaman "to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative." Apparently, the protection did not then extend to masters and apprentices. It was re-enacted in section 156 (1) of the 1894 Act (Imp.) and has been retained as part of section 16 (1) of the Merchant Shipping Act 1970 (Imp.).

In essence, section 156 (1) of the 1894 Act (Imp.) has been enlarged and reproduced in section 83 (1) (d) of the Navigation Act 1912-73 (Comth.) to apply to seamen and apprentices. Under English law, an agreement has been held to be inoperative where it provides for deductions by the owner before salvage is apportioned or for a salvage claim to be abandoned in certain circumstances.<sup>52</sup> It is submitted that in keeping with the legislative intent the words "right that he [i.e. a seaman or apprentice] may have or obtain in the nature of salvage" in section 83 (1) (d) should be widely construed. They should embrace possessory and maritime liens as well as personal remedies. Section 83 (3) renders void every agreement which is inconsistent with the provisions of the 1912-73 Act (Comth.).

Like the Imperial Parliament, the Commonwealth Parliament has adopted certain safeguards. In all cases of wreck or loss of the ship, proof that a "seaman has not exerted his utmost to save the ship, cargo, human life and so forth shall bar his claim to wages."<sup>53</sup> This provision is based on necessity and public policy. Otherwise when the ship is on the high seas, beyond the reach of others, the crew could place her or her cargo in danger, stage a "salvage operation", and then claim a maritime lien. Thus, so long as the master-servant relation subsists between the shipowner, including a demise charterer, and a seaman, the latter cannot claim salvage for saving his own ship or the cargo carried. His claim will, however, be allowed if the service performed is outside the scope of his contractual duty. This occurs when he is regarded as a volunteer, e.g. where he is discharged from service by the master,<sup>54</sup> the ship is finally abandoned bona fide and

52. The Saltburn (1894) 71 L.T. 19; The Leon Blum [1915] P. 290.

53. Navigation Act 1912-73 (Comth.), s. 84; 1894 Act (Imp.), s. 157 (1) (repealed); see 1970 Act (U.K.), s. 16 (1).

54. The Warrior (1862) Lush. 476. See Navigation Act 1912-73 (Comth.), s. 88 (1).

with the master's authority,<sup>55</sup> or the ship is captured by enemy.<sup>56</sup> Where there is a personal liability to pay salvage award, whether under an agreement or maritime law, a salvage lien attaches to the property salvaged.<sup>57</sup>

Section 83 (1) (d) does not extend to an agreement made under section 324 (1). A master or any crew member of a ship, who has rendered salvage services, may voluntarily abandon his lien upon the wreck alleged to be salvaged. Pending the decision of some Federal or State Court, security for an amount based on an agreement made between the parties concerned may be given to the salvor-claimant. The agreement is binding on the ship, cargo and freight and the owners thereof for the salvage which may be adjudged to be payable. Section 324 (1) is clumsily worded. It is grossly unclear as to whether the master who is authorised to enter into the agreement acts for the salvaging vessel or the maritime property saved.<sup>58</sup> Although this provision is in urgent need of redrafting, its beneficial effect must not be overlooked. Where a pre-trial agreement is made, the wreck or other maritime property salvaged can be readily disposed of free from the salvage lien.

Pollution by Oil and other Substances. It will be recalled that in the 1967 Torrey Canyon disaster one of the problems encountered by the British Government was the lack of statutory authority to intervene at an early stage.<sup>59</sup> Thus during the salvage operations, arrangements were being made to buy out the Dutch salvors if the tanker was refloated. The object of the British Government was to acquire complete and immediate control over her disposal. Delay and the worsening weather brought this prospect to an end, resulting in the devastating disaster.

So far as pollution by oil and other noxious substances is concerned, the rights of salvors are increasingly affected by legislation

55. The Florence (1851) 16 Jur. (Pt. I) 572. The abandonment must occur at sea for the purpose of saving life and must be sine spe revertendi.

56. Two Friends (1799) 1 C. Rob. 271, supra.

57. The Hope (1803) 3 C. Rob. 215; The Rapid (1838) 1 Hag. Adm. 419.

58. For corresponding provision, see Merchant Shipping Act 1894 (Imp.), s. 554 (1).

59. See April 1967 (Commd. 3242), para. 12, supra.

and international conventions. Since 1972, various amendments have been made to the anti-pollution legislation of New South Wales, Queensland, South Australia and Victoria. In each State, the Authority concerned, e.g. the Board or Minister, is given fairly wide powers to prevent or reduce the discharge of oil from ships.<sup>60</sup> The exercise of these powers often impinges upon salvage law in a number of ways.<sup>61</sup>

It is a principle of salvage law that salvors, who have effective occupation of a wreck while carrying out salvage work, are entitled to exclusive possession of it. This right was protected from interference in The Tubantia<sup>62</sup> where an injunction was granted. The same principle applies in the case of a vessel which, due to her complete abandonment, constitutes a derelict in maritime law. An important exception arises where her master appears and asserts his authority. The salvors must allow him to "resume charge, to employ whom he pleases, and to take what measures he thinks proper for the preservation of the ship."<sup>63</sup> A salvor's reward may be reduced or even forfeited if he persists in forcing his services upon the master or other representative of the shipowner where they are no longer required. Under the prevention of oil pollution legislation, the Minister or Board may, by written notice, direct certain prompt action to be taken, e.g. the removal of the ship from a specified place or the cargo from the ship. Thus the rights of salvors to exclusive possession and to apply for an injunction to prevent interference are now subject to the overriding statutory powers of intervention.<sup>64</sup> Since compliance with such orders by the shipowners concerned is essential, salvors may agree to carry out their salvage operations as directed.

60. Navigable Waters (Oil Pollution) Act 1960 (Vic.), s. 22, as amended by Navigable Waters (Oil Pollution) Amendment Act 1972 (Vic.), s. 11; Pollution of Waters by Oil Act 1973 (Qld.), ss. 20 and 24; Prevention of Oil Pollution of Navigable Waters (Amendment) Act 1973 (N.S.W.), s. 7A; Prevention of Pollution of Waters by Oil Act Amendment Act 1979 (S.A.), s. 7a.

61. See Chapter 5.

62. [1924] P. 78.

63. The Champion (1863) Br. & L. 69, 70, per Dr. Lushington.

64. See sections referred to in footnote 60 above.

However, in carrying out the orders which are geared towards the prevention or mitigation of pollution, salvors may be disentitled from any reward because the property may ultimately be lost or destroyed. Under sections 8 (2) and 10 (3) of the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.), the measures which the Minister can take on the high seas include sinking or destroying the ship and/or her cargo. It is arguable that, in the light of the extensive powers of intervention conferred by State and Commonwealth Acts, the courts should, wherever it is just and equitable, make an exception to the rule that some property must have been salvaged. The salvage remuneration - it is submitted - should take the form of an award to be made against the shipowners who are under a personal obligation to comply with the orders. Where no res is saved, the salvors' claim is not protected by a maritime lien.

Salvors can adopt another approach. Apparently the duty of compliance with the orders of the Minister or Board under the State Acts is imposed on shipowners.<sup>65</sup> Salvors, by whose initial exertions the property has been preserved up to a point, have a possessory lien thereon. They may refuse to relinquish their lien unless payment is made for their work or some satisfactory arrangement is reached with the shipowners. However, even if neither payment nor arrangement is made, salvors cannot prevent the actions ordered by the Minister or Board from being carried out. One issue relating to the rights of salvors in such circumstances has to be resolved. Under the State Acts, the expenses and other liability incurred by the Minister or Board constitute a debt due from the shipowners to the Crown. The debt not only gives rise to a charge on the ship but also renders her liable to detention until the amount is paid or security acceptable to the Minister or Board is provided.<sup>66</sup> Although a salvor who has contributed to the eventual preservation of the property is

65. Subject to certain exceptions provided in the Acts, the penalty of \$50,000 is imposed for non-compliance with the order: Pollution of Waters by Oil Act 1973 (Qld.), s. 22; Prevention of Oil Pollution of Navigable Waters (Amendment) Act 1973 (N.S.W.), s. 7 C; Prevention of Pollution of Waters by Oil Act Amendment Act 1979 (S.A.), ss. 7 and 7 a; Navigable Waters Oil (Pollution) Act 1960 (Vic.), (as amended), s. 24.

66. Pollution of Waters by Oil Act 1973 (Qld.), s. 23 (3) (b); Prevention of Oil Pollution of Navigable Waters (Amendment) Act 1973 (N.S.W.), s. 7 D (3) (b); Prevention of Pollution of Waters by Oil Act Amendment Act 1979 (S.A.), s. 7 e (1) and (2); Navigable Waters Oil (Pollution) Act 1960 (Vic.) (as amended), s. 26 (3) (b).

entitled to a maritime lien thereon, his claim may be postponed to the statutory charge. This unfortunate result would arise, as we shall see, where the ship subject to the charge is placed under statutory detention.

The Protection of the Sea (Powers of Intervention) Act 1981 (Comth.)<sup>67</sup> gives effect to the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution and the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973. The Minister may, for example, exercise the wide-ranging powers on the happening of a maritime casualty as provided in section 9.

In a number of respects, the position of salvors under the 1981 Act (Comth.) differs from that under the State Acts. Firstly, such measures on the high seas as the Minister regards necessary may expressly extend to the salvage of the ship, part thereof or her cargo.<sup>68</sup> The measures may be ordered whether before or after salvors have commenced work. In the latter situation, they may be construed by courts as additional assistance which the salvors are unable to reject.<sup>69</sup> This statutory intervention will reduce the salvage reward and the value of the lien attached to the property saved.

Secondly, by section 17 (5)<sup>70</sup> a salvor in possession of a ship being salvaged can be personally served with ministerial directions. These may require or prohibit certain acts to be performed in relation to the ship and/or cargo. A salvor may be placed in a dilemma. If he fails to comply with such directions, he may be found guilty of an indictable offence which carries a penalty of up to \$20,000.<sup>71</sup> Compliance with the directions may mean the sinking or destruction of the ship and/or cargo and the loss of the valuable lien, including his right to salvage.

67. See Chapter Five.

68. Ss. 8 (2) (a) (iii), 9 (2) (a) (iii) and 10 (3) (a) (iii).

69. Salvors must not unreasonably refuse the offer of assistance if there is doubt as to the success of their operations: The Cambria (1848) Pritch Ad. Dig. 3rd ed. vol. II, p. 1822; see also The Dantzic Packet (1837) 3 Hagg. 385.

70. Similar powers are exercisable under s. 8 (2) (b) (iii).

71. S. 19 (1).

Thirdly, the measures to be taken must not exceed what is reasonably necessary to prevent, mitigate and eliminate the danger of pollution by oil or other noxious substances.<sup>72</sup> The 1981 Act (Comth.) disallows unnecessary interference with the rights and interests of any persons likely to be affected by the measures. It is, therefore, possible for salvors in certain cases to succeed in challenging the validity of a ministerial order. This course of action may enable salvors to retain possession of the property to which a maritime lien has attached. On the other hand, where the property has been sunk or destroyed, and the direction is held to be excessive, a salvor should be entitled to recover damages against the Minister.<sup>73</sup> An action may be brought for the wrongful interference with the rights and interests of a salvor, and loss of the maritime lien.

Under section 21 of the Protection of the Sea (Civil Liability) Act 1981 (Comth.) provisions are made for recouping the expenses incurred by the Minister.<sup>74</sup> Suppose the shipowners are insolvent and the proceeds of sale of the property saved are insufficient. It is submitted that the salvor's maritime lien should have priority over the statutory charge in favour of the Commonwealth unless the latter has had the ship detained under section 22 (1).

Historic Shipwrecks. The rights of salvors in relation to the subject are affected by both Commonwealth and State legislation. An interesting case dealing with Western Australian law on the matter

72. However, by s. 8 (5), the anti-pollution measures that may be taken are not restricted by s. 8 (4). As to restrictions on the measures that may be taken otherwise than under the Convention and the 1973 Protocol, see s. 10 (4).

73. Under Article VI of the Convention, compensation for damage caused by any unreasonable measure taken may be recovered.

74. Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 22 (1). The Merchant Shipping (Oil Pollution) Act 1971 (c. 59) (U.K.) incorporates into the United Kingdom domestic law many of the provisions of the International Convention on Civil Liability for Oil Pollution Damage, 1969. But it does not confer a charge on the offending ship.



is Robinson v. Western Australian Museum.<sup>75</sup> In 1957, the plaintiff discovered the wreck of the Gilt Dragon, a Dutch East India Company vessel, lost in 1656, less than three miles from the coast. After notifying the Commonwealth Receiver of Wrecks at Fremantle of the discovery and claiming his interest in the wreck as a finder, he lost track of it. In 1963, he relocated the remains, salvaged a number of articles therefrom and, as before, gave notice of the discovery. The Gilt Dragon is named in the Schedule to the Museum Act Amendment Act 1964 (W.A.).<sup>76</sup> As this wreck was vested in the Western Australian Museum Board by the Act (W.A.), no compensation was payable to any person as finder.

It was an offence for any person who, without the consent of the Board, in any way "alters, removes...or assumes the custody or control of any historic wreck vested in the Board." By section 6 (1) of the Maritime Archaeology Act 1973 (W.A.),<sup>77</sup> the property in, and right to possession of, all historic ships are vested in the Museum on behalf of the Crown in right of Western Australia. The plaintiff argued that the Museum Act 1959-1964 (W.A.), the Museum Act 1969 (W.A.), which repealed the former Act, and the Marine Archaeology Act 1973 (W.A.) were void because they were beyond the legislative competence of the State Parliament of Western Australia. He had done such acts of possession in relation to the remains as they permitted under the circumstances. He claimed to be entitled to salvage in the strict sense of the word or fair compensation for his efforts if the Acts were inoperative. Since the members of the High Court of Australia were equally divided in opinion, the decision of Barwick, C.J., prevailed by reason of section 23 (2) (b) of the Judiciary Act 1903 (Comth.),<sup>78</sup> as amended. He held that the Western Australian statutes were invalid and that they interfered with the plaintiff's right to salvage. It was clearly recognized on two grounds that the statutes were void. First, it was beyond the legislative competence of the State to pass statutes dealing with the sea-bed and things

75. (1977-78) 16 A.L.R. 623, decision of the High Court of Australia given on appeal.

76. No. 58 of 1964, s. 11.

77. No. 66 of 1973.

78. No. 6 of 1903.

upon it within three nautical miles from the shoreline.<sup>79</sup> Second, it could not be said that the subject-matter of the Marine Archaeology Act 1973 (W.A.) was related to the peace, order and good government of the State of Western Australia. A finder of a wreck, as described in the situation above, has an interest therein. He should be entitled to salvage reward and also to a maritime lien on the property.

Unfortunately for historic wreck searchers in Australia, as a result of the 1980 Constitutional Agreement made between the Commonwealth Government and each of the State Governments, wider off-shore legislative powers are exercisable by the State Parliaments. It appears that the constitutional powers (coastal waters) legislation does not operate with retrospective effect.<sup>80</sup> Consequently, the Western Australian statutes are not validated.

Victoria<sup>81</sup> and South Australia<sup>82</sup> have each enacted the Historic Shipwrecks Act 1981, which is closely modelled on the Commonwealth Historic Shipwrecks Act 1976.<sup>83</sup> In three important ways, the rights of a finder of a historic shipwreck or relic are affected. The Minister is empowered to require any person, who has custody or possession of a historic shipwreck or relic, to furnish information or to prohibit certain action in relation to it.<sup>84</sup> Moreover, a finder of

79. Barwick, C.J., said: "Having regard to the terms of s. 51 (x) of the Australian Constitution, the State may make laws controlling fishing in the seas comprised in the first three nautical miles off shore of its territory...But the waters within those limits neither form part of the territory of the State nor are themselves the subject of legislative power of the State:" (1977-78) 16 A.L.R., 634. See also New South Wales v. The Commonwealth (1976) A.L.J.R. 218; Pearce v. Florence [1976] A.L.R. 289.

80. See Coastal Waters (State Powers) Act 1980 (Comth.); Constitutional Powers (Coastal Waters) Act 1979 (N.S.W.); Constitutional Powers (Coastal Waters) Act 1980 (Qld.); Constitutional Powers (Coastal Waters) Act 1979 (S.A.); Constitutional Powers (Coastal Waters) Act 1979 (Tas.); Constitutional Powers (Coastal Waters) Act 1980 (Vic.).

81. No. 9722 of 1981 (Vic.).

82. No. 76 of 1981 (S.A.).

83. No. 190 of 1976, as amended by Historic Shipwrecks Amendment Act (No. 88 of 1980) (Comth.).

84. No. 9722 of 1981 (Vic.), ss. 15, 16 and 19 (5); No. 76 of 1981 (S.A.), ss. 10, 11 and 13; No. 190 of 1976 (Comth), ss. 10, 11 and 13.

the remains of a ship, part thereof or any article associated with it, is under a duty to notify the Minister as required. In return for a description of the location of a historic wreck or historic relic, the finder may be paid a reward not exceeding the prescribed amount.<sup>85</sup> Under salvage law, a salvor's entitlement to reward is protected with a maritime lien on the wreck or other maritime property saved. This valuable right may be taken away by the publication of a gazette which declares a historic shipwreck or relic to be vested in the Crown or in one of the specified authorities. By section 20 (3) of the Historic Shipwrecks Act 1976 (Comth.), the ownership of the remains of a particular ship or article will vest in the manner provided "free of any charge or other encumbrance." The State Acts enable salvors and finders, who are thus deprived of their rights, to claim compensation within six months of the publication of the notice.<sup>86</sup> Where maritime property found or saved by a person is acquired under the Commonwealth Act, the compensation is determined by agreement or by an action in court.<sup>87</sup>

Part IX of the 1894 Act (Imp.) does not deal with historic shipwrecks or shipwreck relics as such. Indeed most of its provisions relating to wrecks show by their own terms that they are inapplicable to the waters of British possessions outside the United Kingdom.<sup>88</sup> However, section 523 provides: "Her Majesty and Her Royal successors are entitled to all unclaimed wreck found in any part of Her Majesty's dominions, except in places where Her Majesty or any of Her Royal predecessors has granted to any other person the right to the wreck." It is submitted that, based on section 546,<sup>89</sup> a person who has salvaged an unclaimed wreck or one previously given to another by royal authority is entitled to a lien thereon for salvage rewards. In the view of Gibbs, J.,<sup>90</sup> by section 523, all unclaimed wreck found in

85. Ibid., Act 1981 (Vic.), s. 24 (1); ibid., Act 1981 (S.A.), s. 18 (1); ibid., Act 1976 (Comth.), s. 18 (1).

86. Ibid., Act 1981 (Vic.), s. 26 (3); ibid., Act 1981 (S.A.), s. 20 (4).

87. No. 190 of 1976 (Comth.), s. 21 (1).

88. See ss. 511-529; moreover, ss. 535 and 537 taken together suggest that s. 536 is limited to wrecks in the United Kingdom.

89. It has been reproduced in Navigation Act 1912-73 (Comth.), s. 317.

90. Robinson v. Western Australian Museum (1977-78) 16 A.L.R. 623, at p. 647.

the waters within three miles of the coast of Western Australia becomes the property of Her Majesty. He held that, as the Crown is one and indivisible throughout Her Majesty's Dominions, there was no repugnancy between the provisions of Western Australian statutes, which vested the Gilt Dragon in the Board, and section 523 of the Imperial Act.

#### IV. DAMAGE LIEN

##### 1. Origin

It is possible to trace the origin of the damage lien to the deodand of old English law and the noxal action of Roman Law. Under the former, the cart or other inanimate object which had caused the harm was forfeited.<sup>91</sup> Mayers referred to a statement in an early textbook by Britton that a ship which had caused death or damage would be forfeited. He saw in the idea of a ship as wrongdoer the germ of the maritime lien.<sup>92</sup> In Roman law, noxal surrender was used in ancient practice by the master to free himself from the consequences of wrongful acts committed by the slave. By surrendering the wrongdoer (i.e. the noxa) to the injured party, the master would cease to be responsible.<sup>93</sup> The English notion of forfeiture and the Roman practice of "appeasement" could have led to the recognition of the "personality" or "juridical entity" of the ship.<sup>94</sup> This doctrine gained momentum in a number of ways. In relation to a contractual claim for wages, Powell, J., said that "in the admiralty the body of the ship is liable."<sup>95</sup>

One of the important developments which followed from the fiction is the special recognition accorded to claims for wages and collision damage. The fact that the Court of Admiralty treated such claims as having priority over many others is significant. Probably, the deodand of English law, the noxal action of Roman law and the

91. O.W., Holmes, J., Common Law, pp. 25-30; J.H. Baker, An Introduction to English Legal History (1971), pp. 211-212; deodand was abolished by the statute 9 & 10 Vic., c. 62 (Imp.).

92. "Maritime Liens" (1928) 6 Can. Bar. Rev. 516, p. 518.

93. W.A. Hunter, Roman Law (2nd ed. 1885), p. 167; A Watson, The Law of Obligations in the Later Roman Republic (1965), pp. 274 and 278.

94. G. Price, "Maritime Liens" (1941) 57 L.Q.R. 409, p. 411; R.G. Marsden, "Two Points of Admiralty Law" (1886) 2 L.Q.R., p. 369.

95. Wells v. Osman (1704) 2 Raym. 1044, 1045.

fictitious personality of the ship must have combined to invest suits for collision damage (and wages) with a unique character. Obviously one way of ensuring that such judgment creditors would be paid first out of the proceeds of sale of the ship was for Admiralty judges to recognise an attachment of those claims to the body of the ship.

It appears that The "Aline", decided in 1839,<sup>96</sup> is the first case where the concept of maritime lien was applied in a collision suit in order to obtain a desired result. Through the fault of her master and crew, The "Aline", a Russian vessel, collided with and damaged the vessel "Panther". After the collision but before The "Aline" was arrested, the master executed a bottomry bond. This was given to a third party (D) who had paid for repairs done on The "Aline". The owners of the "Panther" (X Co.) and D were competing claimants. The proceeds of the sale of The "Aline" were insufficient to satisfy the judgment debt in favour of X Co. Dr. Lushington held that X Co. "in possession of a decree of this Court in a cause of damage" had rights co-extensive with those of the owner in the vessel causing the damage.<sup>97</sup> This placed X Co. in a preferred position. For the first time, it was held that the maritime lien on the ship extended to subsequent accretions in the ship's value, arising from repairs performed at the owners' expense, and the freight actually received at the material time.

About twelve years later, the right of the owner of an injured vessel to a maritime lien on the wrongdoing vessel was put beyond question. In The "Bold Buccleugh",<sup>98</sup> the vessel negligently collided with and sank the barge "William" in the River Hunter. Sir John Jervis delivered the Privy Council judgment for the owners of the "William". In declaring their entitlement to a maritime lien, he adopted the classic definition of the term given by Lord Tenterden<sup>99</sup> and the legal process explained by Mr. Justice Story for enforcing it.<sup>1</sup> Lord

96. 1 W. Rob. 111.

97. Ibid., 117.

98. (1851) 7 Moo. P.C.C. 267.

99. Ibid., 284.

1. 1 Sumner, 78; cited by Scott, L.J., in The Tolten [1946] P. 135, p. 144 (C.A.).

Watson in the House of Lords case of Currie v. M'Knight made the following remarks:<sup>2</sup>

"The principle of that decision [in The "Bold Buccleugh"] has been adopted in the American Courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage ...."

The doctrine is now firmly established as part of the maritime laws of the United Kingdom and many British Commonwealth countries.

## 2. Position in Australia

It is opportune at this stage to consider whether this doctrine has become part of Australian laws. Its late development in 1839 or more likely in 1851 renders the Australian Courts Act 1828 (Imp.) inapplicable as a reception mechanism. Unlike the wage lien, the damage lien is not provided for in any of the State marine or State navigation Acts. Strangely enough, it appears that in none of the Australian cases dealing with collisions have judges seized the opportunity to adopt the doctrine. Moreover, the doctrine could not have been imported into the Australian legal systems by the Imperial Merchant Shipping Acts, 1854 and 1894, as the subject of maritime lien for collision damage is outside their scope.

Australian courts of unlimited civil jurisdiction are empowered as Colonial Courts of Admiralty to exercise jurisdiction over all claims for damage done by any ship to the same extent as the High Court of Admiralty in England.<sup>3</sup> In the absence of legislation effectively enacted by the Commonwealth and State Parliaments to the contrary, the principles of maritime law administered by these Colonial Courts of Admiralty should be similar to those of English maritime law. As pointed out earlier, it was a preponderant objective of British policy makers to apply a uniform body of maritime law throughout the Empire. In today's maritime commerce and activities, Australia will lag behind other countries unless this area of the law is brought into line with modern trends.

The decision in The "Bold Buccleugh"<sup>4</sup> is more than persuasive

2. [1897] A.C. 97, pp. 105-106.

3. Colonial Courts of Admiralty Act 1890 (Imp.), s. 2 (1).

4. (1851) 7 Moo. P.C.C. 267.

authority. It was handed down by the Privy Council, being at the apex of the hierarchy of Superior Courts of Appeal in the British Commonwealth of Nations, including those of the Australian States.<sup>5</sup>

There is almost irrefutable indication that the Commonwealth Parliament and two of the State Parliaments had the intention of importing the maritime lien into the Australian legal systems. The Maritime Conventions Act 1911 (U.K.) reads:

"8. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel...or in respect of any salvage services, unless the proceedings therein are commenced within two years...."

The preamble to the Act refers to two Conventions signed in 1910 at Brussels, one dealing with collisions between vessels<sup>6</sup> and the other with salvage.<sup>7</sup> In cases of ambiguity of language, it is permissible to look at the wording of the former Convention. It is unclear whether "lien against a vessel" will only arise in respect of salvage services. But there is no doubt in His Honour Kitto's mind that section 8 covers the damage lien. He said:<sup>8</sup>

"The first class of claims or liens with which the provision deals consists of those which arise from damage or loss caused (wholly or partly) by the fault of one vessel or to the other vessel's cargo or freight or any property or person on board her."

Although the Act does not apply to Australia,<sup>9</sup> section 8 is virtually reproduced in section 396 (1) of the Navigation Act 1912-73 (Comth.).

With regard to the State laws of New South Wales<sup>10</sup> and Tasmania,<sup>11</sup> the position has been placed beyond doubt by the legislatures.

5. Appeals from the High Court of Australia to the Privy Council have been virtually abolished by the Privy Council (Limitation of Appeals) Act 1968-1973 (Comth.) and Privy Council (Appeals from the High Court Act 1975 (Comth.).
6. International Convention for the Unification of Certain Rules with Respect to Collisions 1910, ratified by Britain on 1st February, 1913.
7. Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910, ratified by Britain on 1st February, 1913.
8. Burns Philp & Co.Ltd. v. Nelson and Robertson Pty. Ltd. (1958) A.L.J. 921, p. 925. He agreed with Dixon, C.J., McTiernan and Williams, J.J., that the appeal should be dismissed.
9. Proviso to Maritime Conventions Act 1911 (U.K.), s. 9 (1).
10. Limitation Act 1969 (N.S.W.), s. 22 (2).
11. Limitation Act 1974 (Tas.), s. 8 (2).

In these statutes, the limitation period relating to an action to enforce a "claim or lien" against a vessel in respect of damage to, or loss of, another vessel, her cargo or freight is provided for in a separate subsection from that dealing with salvage lien. It appears that the damage lien provision has had its source in the Commonwealth Act. In the interest of uniformity and certainty, it is imperative for legislation to be introduced in Western Australia, South Australia, Queensland and Victoria to bring the law into line with the existing Commonwealth and State legislation. The Navigation Act 1912-73 (Comth.) applies to ships engaged in inter-State trade, foreign-going ships and ships owned or controlled by the Commonwealth Government.<sup>12</sup> It is submitted that the proposed legislation should apply to certain claims for collision damage sustained within the territorial waters of each of the four States.

### 3. Circumstances giving rise to Damage Lien

Not every collision or wrongful act committed by the crew will give rise to the damage lien. The Admiralty Court judges have long formulated the prerequisites for it. After discussing the case of The "Bold Buccleugh", Lord Watson stated the principle:<sup>13</sup>

"I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the person by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage."

The rule is made up of two elements.

First. There must be default or negligence constituting a breach of duty of care on the part of the crew members or the master in the navigation of the ship. The word "navigation" has been

12. As to proceedings in rem against any ship, cargo or other property belonging to the Commonwealth or a State, see Navigation Act 1912-73 (Comth.), s. 405 A.

13. Currie v. M'Knight [1897] A.C. 97, pp. 106-107.



held to include the steering of a vessel,<sup>14</sup> casting off of a tow rope,<sup>15</sup> selection of an anchorage,<sup>16</sup> neglect to heed a light on a reef,<sup>17</sup> and starting out without regard to weather bureau warnings.<sup>18</sup> It does not extend to default or neglect in the management of a ship<sup>19</sup> which has adverse effects on the cargo carried. Examples are improper loading and recklessly allowing water from a shore-supply pipe to overflow into the holds, resulting in cargo damage.<sup>20</sup> Cargo claimants are not entitled to a lien on the carrying ship. Suppose that due to faulty management the ship lists suddenly and damages another ship or the pier. It is submitted that no lien will attach to the former ship because the damage is not directly caused by negligent navigation.

The authorities have established that the damage lien must have its root in the liability of the owner, or of the crew, of the wrongdoing ship. This is where the concept of the ship's "juridical entity" or "personality" breaks down since in a collision claim "the property is not treated as the delinquent *per se*." Though a ship is commonly spoken of metaphorically as if she were capable of doing a wrong, her liability will depend on whether her navigators can in law be identified with the owners. Dr. Lushington in The Lemington<sup>21</sup> defined

14. The Warkworth (1884) 9 P.D. 20, p. 145.

15. The Vigilant [1921] P. 312.

16. The Etona (1896) 64 Fed. Rep. 880; 71 Fed. Rep. 895.

17. The E.A. Shores (1896) 73 Fed. Rep. 324.

18. Hanson v. Haywood (1907) 152 Fed. Rep. 401; *cf.* Texas and Gulf S.S. Co. v. Parker (1920) 263 Fed. Rep. 864.

19. In Suzuki v. Beynon (1926) 42 T.L.R. 269, 274, Lord Sumner said "management" is not a term of art and has no precise legal meaning. No limitation is put on its meaning.

20. McFadden v. Blue Star line [1905] 1 K.B. 697.

21. (1874) 2 Asp. Mar. Law Cas. 475.

"owners" to include pro hac vice owners (i.e. charterers by demise). The scope of the lien has been widened by his judgment in the following words:<sup>22</sup>

"Damage wrongfully done by the res whilst in the possession of the charterers is, therefore, damage done by the owners or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled prima facie to a maritime lien upon that ship, and to look to the res as security for restitution."

In certain situations, it is competent for owners of vessels or wrecks to negate liability for damage. The facts of The Tasmania<sup>23</sup> furnish a good illustration. A tug engaged in towing the plaintiff's vessel collided with, and sank, her. The tug had been chartered by the defendant company for towing purposes. It was known to the plaintiff that, in providing the towage service, the defendant company was exonerated from liability for loss or damage, whether occasioned by the negligence of their servants or otherwise. The judge held that, since the defendant company's liability was excluded and the tug owners were not personally liable, no action in rem against the tug was maintainable. Although a damage lien prima facie attaches from the time of the collision, it is not absolute as its operation depends on the court's finding of some personal liability.

In The Utopia,<sup>24</sup> the Privy Council laid down the criteria for determining liability where damage arises from collision with a wreck. The Utopia was lying with her two masts, yards and funnel above the water in Gibraltar Bay. Responsibility for placing a hulk near the wreck and displaying lights to warn vessels of the danger was assumed by the Gibraltar Port authority. Evidence showed that the steamship Primula came into collision with the wreck because the lights on board the hulk were insufficient in number and not in the proper position. In delivering the judgment, Sir Francis Jeune held that, in order to fix the owner of the wreck with liability, two conditions had to be satisfied. He must not have relinquished control of the wreck,

22. Ibid., p. 478.

23. (1888) 13 P.D. 110.

24. [1893] A.C. 492.

e.g. by abandonment or legitimate transfer. There must be wilful misconduct or neglect in the discharge of his duty with regard to the protection of other vessels from receiving injury from her. The control and management of the wreck for the purpose of protecting other vessels had been properly transferred to the port authority. On the finding of the absence of negligence on the part of The Utopia owners, the decision of the Vice-Admiralty Court was reversed. The argument that, as the action against The Utopia was an action in rem, the ship could be held liable, though there was no liability in the owners, was rejected by His Lordship as being contrary to maritime law principles.

Transfer of control and management as a means of exonerating the owners and the ship from liability for negligent damage by collision has been recognised in other cases. In The "Halley",<sup>25</sup> the owners successfully invoked section 388 of the Merchant Shipping Act 1854 (Imp.). The Privy Council held that the owners were not liable for damage caused by the unskilful navigation of their vessel by a pilot whom they were compelled by foreign law to take on board. A further application of this concept is evident in The Sylvan Arrow.<sup>26</sup> While the ship was under requisition, manned and operated by the United States Government, she was alleged to have negligently collided with, and damaged, the steamship W.I. Radcliffe. Under the circumstances, it was obvious that the master and the crew had derived their authority from the United States Government and not from the defendant shipowners. Although she was later returned to the defendants, the court held that no maritime lien attached to the ship by reason of the collision damage. One way of explaining the two preceding cases is this. Where the "control and management" transfer has occurred, negligence of the owners or their servants at the time of the collision - as a foundation of the maritime lien - is lacking.<sup>27</sup>

25. (1868) L.R. 2 P.C. 193.

26. [1923] P. 220.

27. See The Utopia [1993] A.C., p. 499, per Sir Francis Jeune.

There are, however, certain exceptions. Where strict liability is imposed, e.g. by statute, the lien will attach even in the absence of negligence. By the Navigation Act 1912-73 (Comth.) the master of the ship is not relieved from responsibility for the conduct and navigation of the ship while she is under pilotage. It means that the ship will be subject to the lien where collision damage is negligently caused by the pilot. Section 410 B (2) deals specifically with compulsory pilotage required by the law of a State or Territory. In such situations, despite "anything contained in an Act or State Act", the owner or master of the ship is rendered liable for any loss or damage caused by the ship during navigation. Thus where the provision applies, the lien will arise, even though the master is not negligent.

There is another instance to be borne in mind. The lien comes into existence on the occurrence of a collision. It follows the res into the hands of subsequent purchasers, even though they are unaware of, and not liable for, the collision.

Second. According to Lord Watson in Currie v. M'Knight,<sup>28</sup> the damage or loss must have been directly caused by the ship as a noxious instrument. To come within this requirement, the ship must have been an active agent in producing the mishap. In this case, the steamship Easdale was moored to the quay by cables passing over the deck of another vessel The Dunlossit. To prevent the peril of damage to The Dunlossit from contact with the vessels on both sides, the crew cut the mooring ropes of the Easdale and took to sea. Being short-handed, the Easdale was driven ashore and damaged.<sup>29</sup> The House of Lords held that no lien would arise on the ground that the damage was occasioned wholly by the act of The Dunlossit's crew for the purpose of removing an obstacle which prevented her from taking to sea. Damage due to impact by The Dunlossit or her movement is regarded as essential to the existence of the lien and its attachment

28. [1896] A.C. 97, pp. 106-107, following the decision in The "Bold Buccleugh" (1851) 7 Moo. P.C.C. 267.

29. The owners of The Dunlossit were held liable.

to her. Lord Herschell has, however, given a broader ambit to the principle. In his view, physical contact by the wrongdoing ship is not necessary. Thus, if owing to the negligent navigation of vessel A, vessel B is driven into collision with vessel C or an object, the lien will attach to vessel A for the damage done. McGuffie in his learned work holds a similar view but takes care to point out that it "has not been expressly decided."<sup>30</sup>

Damage and property subject to lien. A searching question concerns the type of mischief which is recognised as giving rise to the lien. In The "Aline" and The "Bold Buccleugh", the principle began with collision damage to vessels. It was extended to injury to a landing stage, a pier or harbour works and later to a wreck. In the historic case of The Tolten,<sup>31</sup> the English Court of Appeal had to consider, *inter alia*, whether the doctrine would apply where injury was negligently done by a ship to a wharf or structure at Lagos, a British colony. Bucknill, J., gave judgment in the admiralty action *in rem* for the plaintiff owners and occupiers of the wharf at Lagos. The appeal brought by owners of the British vessel The Tolten was unanimously dismissed. Somervell, L.J., emphasises the desirability in the interests of nations *inter se* to apply the same principle as follows:<sup>32</sup>

"It was decided in The Veritas that damage to a port in British waters gave rise to a maritime lien, and I see no reason for applying any different rule when the damage is to a foreign port."

The decision and what Scott, L.J., said in his judgment are a short step to recognizing the lien as security for injury by a ship, as an instrument of mischief, to goods and/or people on a wharf in a foreign port.<sup>33</sup>

Undoubtedly, the extent of the security is of primary concern to litigants seeking compensation. Closely related to the consideration is the nature of the property which could be subject to the

30. Kenneth C., McGuffie, The Law of Collisions at Sea (11th 1961), para. 82.

31. [1946] P. 135 (C.A.).

32. *Ibid.*, p. 165.

33. D.R. Thomas, Maritime Liens (1980), pp. 132-133, is of the view that a maritime lien extends to personal injury. Under International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1926, Article 2 para. 4, and 1967, Article 4 para. 1 (ii), maritime liens are conferred for (a) bodily injury to passengers or crew, and (b) loss of life or personal injury, respectively.

damage lien. The authorities have established that the lien attaches to the hull of the ship, her tackle and apparel, a wreck and the fragments into which it may be broken. In The "Aline",<sup>34</sup> Dr. Lushington held that it extended to subsequent accretions in the value of the ship arising from repairs effected at the owners' expense and the freight payable at the material time. Fishing gear, sails and rigging have been held to be subject to it.<sup>35</sup>

The principle has an important limitation which was first pronounced by the United States Supreme Court in United States of America, Owners of the Western Maid v. Auxiliary Schooner Liberty and Steamship Carolinian.<sup>36</sup> It was held by a majority of the judges that, in the case of collision, no maritime lien attached to a government-owned ship. The English Court of Appeal decision in The Tervaete<sup>37</sup> seemed to have gone one step further. In a collision, the respondents' vessel Lynntown was negligently damaged by the ship Tervaete which at the time was the property of the Belgian Government and engaged in the government's service. Subsequent to the collision, the Belgian Government transferred The Tervaete to a private owner who sent the vessel to a dock in England. The respondents contended that, as she had become private property, the damage lien which had attached to her could be enforced by proceedings in rem in the English Court of Admiralty. Their Lordships were unanimous that collision damage occasioned by a foreign state-owned vessel does not, by English law, impose a lien on the vessel. The effect of the rule is this. Since at the time of the collision no lien was in existence - not being a case where it was kept in abeyance, "it cannot attach at all" when she was later transferred into private ownership.

34. (1839) 1 W. Rob. 111.

35. The Alexander (1812) 1 Dods. 278; The Dundee (1823) 1 Hag. Adm. 109.

36. Unreported case, but referred to in The Tervaete [1922] P. 259, p. 261.

37. [1922] P. 259.

The decision is based on the principle of international law that a foreign sovereign or foreign state cannot be impleaded at all in a court of law unless there is submission to its jurisdiction. It is submitted that the principle was extended to ships when their Lordships unanimously refused to impose the lien. The reason was to prevent the value of the ship in the sovereign's hands being adversely affected.<sup>38</sup>

There is little doubt that Australian judges will adopt the same principle and approach in administering Commonwealth and state laws. In the United States of America v. Republic of China,<sup>39</sup> the plaintiff sought to enforce a mortgage of the ship "Union Star" when she was in the Port of Brisbane. The mortgage was allegedly given by her owner, the Republic of China, to the plaintiff. The Supreme Court of Queensland ordered the writ and all the proceedings to be set aside and the plaintiff to pay the costs of the motion. Philp, J., based his judgment for the Republic of China solely on English case-law principles. As the Queen of the United Kingdom is also the Queen of the Commonwealth of Australia, it is inconceivable that, in their relations with foreign sovereigns and their property, the two nations should adopt different doctrines.

The "foreign sovereign" principle first applied by American and later by English Admiralty Court judges to exempt foreign government-owned ships from attachment of the damage lien was apparently adopted by the Imperial Parliament. It sought to extend to certain property owned by the British Government a similar privileged treatment, where proceedings in rem are instituted in English courts and possibly in foreign tribunals. The Crown Proceedings Act 1947 (Imp.),<sup>40</sup> which deals, inter alia, with the civil liabilities and rights of the Crown, does not "give to any person any lien on any...ship, aircraft, cargo or other property" belonging to the Crown. About nine years later, the Commonwealth Parliament introduced a similar provision by

38. Ibid., p. 266, per Bankes, L.J.; p. 271, per Scrutton, L.J.; p. 275, per Atkin, L.J.

39. (1950) Q.S.C.R. 6.

40. 10 & 11 Geo. VI, c. 44, s. 29.

amending the Navigation Act 1912-73 (Comth.). Thus the amended section 405A (1) (b) reads

"Nothing in this Act gives any person a lien on a Government ship or cargo or other property belonging to the Commonwealth or a State."

The expression "Government ship" is widely defined in section 6 (1). It includes a ship which belongs to the Commonwealth<sup>41</sup> or a State or which is demised or sub-demised to, or in the exclusive possession of, the Commonwealth or a State. It extends to a ship the beneficial interest in which is vested in the Commonwealth or a State. The provision is of outstanding importance in that it exempts all such property from attachment of the damage lien and all other maritime liens.

Contributory Negligence in Collision. We have seen that, apart from certain exceptions, the lien comes into existence as a privileged claim upon the offending ship. Since it provides a remedy for the loss attributed to her fault, it is relevant to consider how the loss occasioned in a collision may be apportioned.

Until recently, where the cause of an accident was due to the fault of both parties, there was a difference between the rule of common law and the rule of Admiralty. By the former, if the accident was occasioned by both, however small the blame might be on one side, neither party could recover. The loss was treated as an inevitable accident, and would lie where it fell. Prior to the case of Hay v. Le Neve<sup>42</sup> there was a question in the Court of Admiralty as to whether the loss sustained was to be apportioned to the two parties according to the degree in which they were to blame. Since the decision by the House of Lords, the rule of Admiralty became settled. Thus if both parties had negligently contributed to the collision, the loss would be brought into a hotchpotch and divided between them. The party who had sustained greater loss would have a maritime lien on the other's vessel for the difference in amount recoverable from him. This Admiralty rule of equal apportionment remained an aspect of

41. For definition of "Commonwealth ship", see Navigation Amendment Act 1980 (Comth.), s. 5 (1) (b).

42. (1824) 2 Shaw Sc. App. 395, 404.



English maritime law until statutory effect was given to the International Convention for the Unification of Certain Rules with Respect to Collision between Vessels, 1910, by the Maritime Conventions Act 1911 (U.K.). However, Australia did not become a signatory to the Convention until some two decades later.<sup>43</sup> Moreover, she is expressly excluded from the scope of the 1911 Act (U.K.).<sup>44</sup>

It is not merely of academic interest to ask what rule Australian courts would apply if two ships involved in a collision were to blame. Apparently, the Admiralty rule as laid down in Hay v. Le Neve<sup>45</sup> would either have been imported into Australia under the Australian Courts Act 1828 (Imp.) or quite likely be followed by Australian judges. The position of Queensland<sup>46</sup> and Victoria<sup>47</sup> had been clarified by legislation which provided for the application of the rule in the administration of maritime law. To avoid the harshness of such a rule, Australian judges were often reluctant to put any blame on a party, unless some neglect or fault actively contributing to the collision was established. This is well explained by Lord Selborne, L.C., in his speech in Spaight v. Tedcastle:<sup>48</sup>

"Great injustice might be done, if, in applying the doctrine of contributory negligence to a case of this sort, the maxim proxima, non remota, spectatur, were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence

43. It was through Britain that Australia acceded to the Convention on 9th September, 1930; see N. Singh, International Maritime Law Conventions (1983), vol. 4, p. 2958.

44. See proviso to Maritime Conventions Act 1911 (Imp.), s. 9 (1).

45. 2 Shaw Sc. App. 395.

46. Supreme Court Act 1867 (Qld.), s. 20 provided that all laws and statutes in force in England at the time of the passing of the Imperial Act 9 Geo. IV, c. 83, not being inconsistent with the laws in force in the colony, would be applied in the administration of justice in Queensland courts.

47. Supreme Court Act 1890 (Vic.), s. 63 (9) read: "In any cause or proceedings for damages arising out of a collision between two ships, if both ships shall be found to have been at fault the Rules in force prior to the commencement of "The Judicature Act 1883" in the Court of Vice-Admiralty so far as they have been at variance with the Rules in force in Courts of Common Law shall prevail."

48. 6 A.C. 217, p. 219; applied by Street, J., in The Mintara and The Wairuna (1909) 9 S.R. (N.S.W.) 97, p. 104.

by the plaintiffs cannot be established by merely showing that if those in charge of the ship had in some earlier state of navigation taken a course...a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect."

Unfortunately, in cases of non-compliance with collision regulations, the efforts of Australian judges to apply equitably Lord Selborne's proposition were for a long time thwarted by section 419 (4) of the Merchant Shipping Act 1894 (Imp.). Under the sub-section, a ship involved in a collision was deemed to be at fault where any of the collision regulations was contravened by that ship. Here again it is noteworthy that the Maritime Conventions Act 1911 (U.K.), which repealed the provision, has no application to Australia.

The anachronism in Australian law and indeed the unjust result due to delay in implementing the 1910 Convention<sup>49</sup> are seen in the New South Wales case of Coal Cliff Collieries Ltd. v. The Saros; Hazelwood Steamship Co. Ltd. v. The Saros,<sup>50</sup> decided in 1915. When ship S, at a high speed and in close proximity, overtook a smaller ship H, a suction or interaction was set up between them, causing them to collide. As a result of the collision, ship H was thrown off, but she committed a breach of the statutory regulations in not keeping on the starboard side of the ship SH with which she collided. There was no doubt as to the liability of ship S. Since the collision occurred in Port Jackson, within New South Wales waters, the position as regards ship H was apparently governed by the Navigation Act, 1901 (N.S.W.). Street, J., followed the Full Court of Appeal decision in Australasian Steam Navigation Co. v. Smith and Others<sup>51</sup> and held that section 117 did not override, but had to be read subject to, section 419 (4) of the Merchant Shipping Act 1894 (Imp.). It was not established

49. International Convention for the Unification of Certain Rules with Respect to Collisions between Vessels, 1910.

50. 33 W.N. (N.S.W.) 3.

51. (1885-6) 7 N.S.W.R. 207, supra.

on behalf of ship H that departure from the collision regulations was necessary under the circumstances or that the change of her course could not by any possibility have contributed to the accident. Accordingly, both ships, S and H, were held to blame. Ship SH, to which no fault was attributed in respect of the collision, was held entitled under the principle of maritime law to recover the entire damage from either of the two delinquent ships.

It was open to the owners (SH Co.) of ship SH to enforce the damage lien for the entire loss against either ship. Suppose that by enforcing the lien against ship H, SH Co. was able to obtain full compensation. It is questionable whether, in respect of the contribution recoverable from the tortfeasors, the owners (H Co.) of ship H could by subrogation avail themselves of the lien which SH Co. could have enforced against ship S.<sup>52</sup> If this course of action was not allowed, the right of H Co. to contribution could be defeated by other claims which had a higher ranking, particularly where the owners of ship S were insolvent.

Subject to certain exceptions, the provisions of the Maritime Conventions Act 1911 (U.K.)<sup>53</sup> were reproduced by the Commonwealth Legislature in sections 259 to 365 and 396 of the Navigation Act 1912-1973 (Comth.). These sections were brought into force by a proclamation dated 31st March, 1920,<sup>54</sup> about ten years after the 1911 Act (U.K.) was passed. The King v. Owners of S.S. Argylishire<sup>55</sup> was probably the first collision case which arose after such provisions became operative. Two vessels came into collision in Moreton Bay by reason of the negligence of both sides. MacNaughton, J., applied section 259 (1) of the Navigation Act 1912 (Comth.). It read:

52. For right of contribution involving collision between ships, see Navigation Act 1912-73 (Comth.), s. 259 (1); Supreme Court Act (Vic.) (No. 6387 of 1958), s. 66 (1); Supreme Court (W.A.) 1935-1979 (rep. 12th May, 1980) s. 26 (1).

53. 1 & 2 Geo. V, c. 57.

54. As provided in Act (No. 4 of 1913) (Comth.), s. 1. The sections came into force on 1st July, 1921; see The King v. Owners of S.S. Argylishire (1922) St. R. Qd. 186, p. 203.

55. (1922) St. R. Qd. 186. It appears that the collision occurred in circumstances that rendered the Commonwealth law applicable.

"where, by fault of two or more vessels, damage or loss is caused to one or more vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault."

The judge apportioned the damages as to two-thirds against the Argylshire and one-third against the other vessel. It is submitted that the vessel, which has suffered less damage but adjudged as more blameworthy than the other, will be subject to the damage lien for the difference in amount.

The specific legislative powers exercisable by the Commonwealth Parliament have created some doubts as to the sphere of operation of sections 259 to 265 of the Navigation Act 1912-73 (Comth.). In the New South Wales case of Schleederer v. The Ship Red Fin<sup>56</sup> a motor launch collided with, and sank, a yacht in Sydney Harbour. The collision was caused by the contributory negligence of the helmsman of the launch and the yacht's helmsman. Sheppard, J., held that the matter of contributory negligence was governed by section 10 of the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.).<sup>57</sup> The section, however, has no reference to collision between ships. In his view, the case fell outside the scope of the Navigation Act 1912-73 (Comth.). He said:<sup>58</sup>

"However, it would appear that those provisions [i.e. in section 259] apply only in cases which are within the limits of Commonwealth legislative jurisdiction. That is, they would not apply to a case such as the present where neither of the vessels involved was a vessel engaged in inter-State or overseas trade."

If the reasoning of Sir Frederick Jordan and Sheppard, J.'s judgment are correct, an anomaly exists.<sup>59</sup> It appears that only Victoria,<sup>60</sup> Western Australia<sup>61</sup> and South Australia<sup>62</sup> have legislation providing

56. [1979] 1 N.S.W.L.R. 258.

57. No. 32 of 1965.

58. [1979] 1 N.S.W.L.R. 258, p. 262.

59. Sheppard, J.'s judgment was in part based on the view of Sir Frederick Jordan expressed in The Admiralty Jurisdiction in New South Wales (1937), Sydney, p. 32; see also Kirmani v. Captain Cook Cruises Pty. Ltd. (1984-85) 59 A.L.J. 265.

60. Supreme Court Act 1958 (Vic.), s. 64.

61. Supreme Court Act 1935-1979 (W.A.), s. 26 (1).

62. Supreme Court Act 1935-1975 (S.A.), s. 111.

for the liability to make good the loss or damage sustained in proportion to the degree in which each vessel involved in the collision was in fault. There is the need for similar legislation to be introduced in the other States to bring the law into line with the developments.

#### V. BOTTOMRY BONDS

Dr. Lushington said that "the very term 'bottomry' implies sea risk."<sup>63</sup> In Cargo ex Sultan, "bottomry" was taken as a Flemish term derived from the figurative use of the bottom or keel to embrace the entire vessel.<sup>64</sup> Lord Stowell in The Atlas,<sup>65</sup> decided in 1827, defined bottomry bonds as "contracts in the nature of mortgages of a ship on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo, *pars pro toto*, as security for repayment." They were usually given by the master for payment of repairs and other necessary expenses in foreign ports where the owners had no personal credit. Where the cargo alone is hypothecated, the contract is termed *respondentia*. For convenience, reference to bottomry bonds is intended to include *respondentia*.

Before ship mortgage registrations were introduced, such bonds were used for the benefit of shipowners and the general advantage of commerce. They had been regarded with peculiar favour in Courts of Admiralty as of "a very high and sacred character" and were "held in great sanctity by the Maritime Courts of Europe generally."<sup>66</sup> For a valid contract of bottomry to be made giving rise to a maritime lien, it must, *inter alia*, state the voyage on which the maritime risk was to be run and the time when the loan was to become repayable.<sup>67</sup>

63. The Royal Arch (1857) Swab. 269, 281.

64. (1859) Swab. 504, 510.

65. 2 Hag. Adm. 48, 53.

66. The Hope (1873) 1 Asp. Mar. Law. 563, p. 565; Zodiac (1825) 1 Hag. Adm. 320, p. 323.

67. In The James W. Elwell [1921] P. 351, the instrument was held to be unenforceable as a bottomry because these two requirements were not satisfied.

If the property is lost in the course of the voyage due to any peril enumerated in the contract, the lender will lose his money. By a statute (Imp.) of George II,<sup>68</sup> protection was provided where the property, subject to the bond and insured under a policy in the manner prescribed, was lost. The bondholder was entitled to recover a proportionate part of the estate of the shipowners or insurers in the event of their bankruptcy.

For further advances made by creditors, the court may, in special circumstances, grant a bottomry bondholder priority of payment out of the proceeds of the sale. In the "Kammerhevie Rosenkrants",<sup>69</sup> to save the expense arising from the detention of the ship by her crew, the bondholders were permitted to pay the wages of the crew. The court decreed that, in respect of their advances, the bondholders were entitled to be paid out of the proceeds of sale of the ship in priority to other claimants.

For a number of reasons, bottomry bonds have become obsolete for over two decades now. The lucrative business of lending money on such bonds, which attracted exorbitant interest rates, was based on a twofold concept. Owing to unforeseen events, e.g. damage to the ship or shortage of necessities, funds were urgently needed in a foreign port. Otherwise the ship would have to be sold and the valuable venture would be lost. The lender also took upon himself the maritime risk of the voyage as an insurer. He would lose his outlay if the ship failed to reach the destination safely. In modern credit-finance agreements, the above considerations carry little weight and are hardly relevant. Moreover, it is unlikely that such problems will threaten to break up a voyage. Usually funds could be made available at short notice by telegraphic transfer or by the ship's agents located in foreign ports.

There was a growing uneasiness among shipowners and cargo-owners about the wide authority of ships' masters to hypothecate the ship, freight and cargo. Thus in The Oriental<sup>70</sup> and The Bona-

68. (1746) Anno decimo nono Georgij II, c. 32, s. 2.

69. (1822) 1 Hagg. 62.

70. (1851) 7 Moo. P.C.C. 398.

parte,<sup>71</sup> the court gave effect to the concern by holding that such an authority was only exercisable subject to communication with the owners and other persons. The requirement restored the rights of maritime property owners but rendered doubtful the validity of the bonds given.

The point is illustrated in an Australian case which also shows that the principles of maritime law relating to bottomry bonds are part of Australian jurisprudence. In Re The "Lady Franklin",<sup>72</sup> a ship belonging to a New Zealander discharged her cargo at Melbourne with the intention of proceeding to Newcastle. The master obtained three separate advances from the agents for repairs and wages, and on 24th January, 1874, executed a bottomry bond for the repayment. Unknown to the agents, the shipowner had become insolvent on 13th January. The respondents, who held a mortgage executed in September, 1873, seized the ship. As the voyage was not terminated at Melbourne, the bond was not rendered invalid on that ground. The court, however, held that the bond was invalid because of the master's failure to communicate with the owner. It was further held that the agents could not convert the advances made upon the owner's personal credit into a bottomry bond.

It will be recalled that the maritime lien was first conferred by section 1 of the Merchant Shipping Act 1889 (Imp.) on the master in respect of disbursements made or liabilities incurred by him on account of the ship.<sup>73</sup> From the viewpoints of the master, ship-repairers and necessities men, this lien provides a valuable security for credit facilities, in place of the anachronistic bottomry bond. Its validity is not dependent on prior communication being made with the owners. The interests of cargo are safeguarded in that its attachment is confined to the ship and freight. We have noted that a similar lien is conferred on the master by section 94 (2) of the Navigation

71. (1853) 8 Moo. P.C.C. 459.

72. (1874) 5 A.J.R. 185 (Vic. Vice-Admiralty Court).

73. Reproduced in Merchant Shipping Act 1894 (Imp.) s. 167 (1); now replaced by Merchant Shipping Act 1970 (U.K.), s. 18.

Act 1912-73 (Comth.). The availability of the master's disbursement lien to the suppliers of necessities in certain circumstances was recognised in The Ripon City.<sup>74</sup> That bottomry is obsolescent is obvious from the last English decision in The St. George,<sup>75</sup> delivered in 1926.

## VI. ORDER OF PRIORITY

We have come to a complex area of the law-namely, how the privileged claims rank among themselves. Where the shipowners are insolvent and the fund obtained from the sale of the res is insufficient to pay in full the lien-holders, in what order will the distribution be made? Certainty as to the rules that determine the preference of one type of lien relative to another is essential to all prospective creditors who look to the ship as security. Persons who come under the category include ship financiers, repairers, suppliers of necessities, seamen, masters, salvors and claimants under the law of torts. The shocking scarcity of Australian legal material on the subject has complicated our investigation.

### 1. Domestic Law

As a matter of principle, the courts strive to ensure that in every dispute involving competing claimants equity and justice are administered. Barring any special circumstances, British judges will generally apply the order of preference as outlined in Halsbury's Laws of England:<sup>76</sup>

"In the first place, liens arising ex delicto, in the absence of laches, rank as between themselves pari passu, but in priority to liens arising ex contractu, except a subsequent lien for salvage. Secondly, as a general rule, maritime liens arising ex contractu, namely those for master's wages, disbursements and liabilities, seamen's wages, bottomry and salvage, are payable in the inverse order of their attachment, although as between themselves wages rank pari passu."

The formula for adjusting the preferential rights of the parties is

74. [1897] P. 226.

75. [1926] P. 217.

76. (4th ed. 1983), vol. 43, para. 1143; see also D.R. Thomas, Maritime Liens (1980), op. cit., pp. 246-250.



based on two distinct but related grounds. Firstly, a person having a lien arising ex contractu, e.g. for wages, disbursements and bottomry, is deemed a part-owner in interest with the proprietors of the vessel. A lien-holder becomes a party to the adventure. He holds the lien on the ship subject to the vicissitudes of her voyage, including fresh liens which may arise.<sup>77</sup> Consequently, each claimant by rendering services or advancing funds has helped to keep the ship in motion in achieving the object of maritime commerce. All the claims which arise ex contractu will rank in the inverse order of their attachment. As between salvage claims which arise quasi ex contractu, the same rule applies in that a subsequent salvage, which has preserved the res, has priority over an earlier one.<sup>78</sup>

Secondly, the high priority accorded by courts to damage lien is founded upon a combination of several considerations. Unlike holders of liens for wages, disbursements, salvage and bottomry, a person suffering damage by negligent navigation of a ship has not chosen to enter into any relationship with the vessel for his own interests.<sup>79</sup> It has been noted that salvors, seamen, masters and bottomry bondholders are, by reason of their liens on the vessel, part-owners. Since they have some control over her employment, they should to the extent of their interests be held responsible for collision damage due to negligence. In The Linda Flor,<sup>80</sup> Dr. Lushington was exercising the equitable maritime jurisdiction of the Admiralty Court. He concluded that it would be unjust to the owner of the injured ship if the fund against which the damage lien had priority was reduced by paying wages. Moreover, the special preference given to the damage lien is justified by public policy to ensure the safety of lives and property as well as the proper navigation of vessels. By case

77. The Veritas [1901] P. 304, p. 313; The Elin (1882) 8 P.D. 129, p. 130.

78. The Veritas [1901] P. 304, pp. 312-313.

79. The "Aline" (1839) 1 W. Rob. 111, 118, *per* Dr. Lushington; The Elin (1883) 8 P.D. 129.

80. (1857) Swab. 309; 6 W.R. 197; The Benares (1850) 7 No. of Cas. Supp. 50.

authorities, a damage lien ranks before an earlier, but not a subsequent, salvage lien.<sup>81</sup>

Thus under English maritime law, seamen and masters tend to be victims of the misfortunes of shipowners, particularly where limited companies are involved. It is most unfortunate that the wage lien of seamen and master's liens for wages and disbursements are postponed to prior and subsequent liens for salvage<sup>82</sup> and collision damage.<sup>83</sup>

However, with regard to the remedies of unpaid seamen and masters, the Commonwealth Parliament adopts a different approach. It pursues a conspicuous "employee welfare" policy much at the expense of other interests, e.g. those of financiers, salvors and victims of collision damage. By section 83 (2) of the Navigation Act 1912-73 (Comth.), "the lien for seamen's and apprentices' wages shall have priority of all other liens." It is submitted that, for similar policy considerations, the effect of section 91 (1) and (2) is to upgrade master's liens for his wages and disbursements to the same order of ranking as seaman's wage lien. Certainly, unlike the position under English maritime law, the lien for seamen's and apprentices' wages enjoys priority over "all other liens", including of course salvage and danger liens. What is uncertain, pending a strong High Court of Australia decision on the point, is whether the words "all other liens" include subsequent salvage and damage claims. If the above submission is correct, the top preferential treatment accorded to master's lien for disbursements, which ranks equally with seamen's wage lien, is a important factor to the ship's creditors. The potential and viability of this lien depends on what Australian courts consider as disbursements or liabilities properly made or incurred by the master on account of the ship. Where this valuable security is available, it is

81. The Inna [1938] P. 148; The Elin (1882) 8 P.D. 129; see also Currie v. M'Knight [1897] A.C. 97, p. 106, per Lord Watson.

82. The Mons. (1932) 43 Ll. L. Rep. 151; The Sabina (1842) 7 Jur. 182.

83. Currie v. M'Knight [1897] A.C. 97, pp. 105-106, per Lord Watson.

to be preferred by prospective creditors to a ship mortgage or bottomry bond. It is likely that the persons in whose favour the master has, on account of the ship, incurred liability may be subrogated to the master's claim vis-a-vis the ship. They may be able to enforce the lien. Moreover, section 83 (3) renders void every stipulation in any agreement which is inconsistent with the provision of the Navigation Act 1912-73 (Comth.). It seems to strengthen a master's position as regards the wage lien and disbursement lien under section 94.

It should be borne in mind that the order of priority accorded to the maritime liens may be affected by legislation other than the Navigation Act 1912-73 (Comth.) and by the rules of conflict of laws.

As an example of the former, we shall first look at a situation under English law. In the House of Lords case of Mersey Docks and Harbour Board v. Hay,<sup>84</sup> the steamship Countess negligently collided with, and carried away part of, the dock gates belonging to the Board, and also damaged or sank about twenty barges. To keep her from sinking and prevent her from being a danger to safe navigation of the port, the Board exercising its powers under the Mersey Docks and Harbour Act 1912 (U.K.)<sup>85</sup> took charge of, and effected temporary repairs on, her. The damage done to the barges amounted to £55,000, while the damage done to the Board's gate came to £10,000. For the damage done to the dock, the Countess was detained by the Board in the exercise of its powers. By section 94 of the Mersey Docks Acts Consolidation Act 1858 (U.K.), when damage was done to any gate or work of the Mersey Docks and Harbour Board through the negligence of those on board the vessel, she would be detained until

84. [1923] A.C. 345.

85. 2 & 3 Geo. V, c. 12.

such damage was paid for or sufficient deposit was made. The vessel was subsequently released on payment into court by the owners of £55,000, which represented the statutory amount of their liability and the expenses incurred by the Board. The House of Lords held that the whole of the fund was to be paid to the Board on the ground that its statutory power to detain the ship, constituting a possessory lien thereon, was exercisable until payment was made. Although in point of time the collision damage caused to the barges was subsequent to that caused to the dock gates, the Board's claim was accorded priority over the damage lien of the barge owners.

It is quite probable that, following the House of Lords decision, Australian parliamentary draftsmen have adopted a similar technique. We have already referred to the Commonwealth and four State Acts<sup>86</sup> on the prevention of pollution of waters by oil. These Acts provide that the expenses or other liability incurred by the Minister or Board in exercising the statutory powers is a charge on the ship. She may be detained until the amount is paid or "security for the payment of the amount is given to the satisfaction of" the Minister or Board. The exercise of such power resulting in actual detention, which constitutes a possessory lien on the ship, may override the high-ranking wage lien and master's disbursement lien. An inherent weakness of this "overriding" charge is that its precedence will only operate under the relevant Commonwealth or State Act.<sup>87</sup>

## 2. Conflict of Laws

This segment of the work examines two methods used by courts outside Australia to adjudicate upon various claims which arise under

86. Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 22 (1); Prevention of Pollution of Waters by Oil Act 1979 (S.A.), s. 7e (1) and (2) as amended; Navigable Waters (Oil Pollution) Act 1960 (Vic.), s. 26 (3), as amended; Prevention of Oil Pollution of Navigable Waters Act 1960 (N.S.W.), s. 7D (3), as amended; Pollution of Waters by Oil Act 1960 (Qld.), s. 23 (3), as amended.

87. For issue relating to the order of priority under conflict of laws, see *infra*. See, however, Draft Admiralty Bill 1985, clause 37. It relates to cases where, as a result of any civil claim, a ship may be detained under a statute. Under the Draft Admiralty Bill, where the civil claim is enforceable by proceedings *in rem*, it is payable in priority to "any claim against the ship...." It appears that if clause 37 (5) is implemented as law, the position of holders of maritime liens for wages and disbursements will be adversely affected.

different national systems of law. On the presumption that the more authoritative method will be adopted, it is essential to know how policy matters embodied in Australian legislation may be affected.

Under Australian laws, maritime liens for six classes of claims have been established.<sup>88</sup> The laws of the United States of America<sup>89</sup> and Taiwan,<sup>90</sup> for example, confer maritime liens on at least thirteen types of claims. By the laws of France<sup>91</sup> and Germany,<sup>92</sup> creditors, e.g. mortgagees and necessities men, are given certain rights against the ship. In general terms, the order of preference accorded to maritime claims differs from one legal system to another. It is not uncommon to come across rights conferred on creditors by foreign maritime laws which do not fit into any of the categories recognised by Australian laws.<sup>93</sup> Suppose an American-registered ship belonging to an insolvent company is arrested in Sydney by A who is entitled to salvage under German law. At the trial B, a seaman, claims that his three months' wages have not been paid, and C claims a maritime lien on the ship under American law for necessities supplied to the ship. It is questionable as to what rules of conflict of laws should be applied so as to determine the ranking of the three claims in a just manner.

88. The maritime liens recognised are those in respect of damage, seamen's wages, master's wages, master's disbursements, salvage of property and bottomry including respondentia.

89. In addition to the above, maritime liens are conferred on at least seven other types of claims, viz. (i) general average contribution: The Odysseus III, D.C. Fla. (1948) 77 F. Supp. 297; (ii) shipbroker's reimbursements: The Anna R. Heldritter, D.C. Mass, (1923) 289 F. 112; (iii) freight alone: Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., C.A. Cal. (1962) 306 F. 2d. 188; (iv) pilotage: Ajubita v. S/S Peik, C.A. La. (1970) 428 F. 2d. 1345; (v) towage: The Transmarine Barge No. 100, C.C.A., N.Y. (1932) 62 F. 2d. 252; (vi) wharfage: Beard v. Marine Lighterage Corp., D.C., N.Y. (1924) 296 F. 146; (vii) ship-repairs and necessities: The "Halcyon Isle" [1980] 3 All E.R. 197; see also United States Code Title 46, Shipping, chap. 25, 971-973.

90. See M.C. Huang, "Maritime Liens in the Republic of China" (1977) 8 (No. 2), J.M.L.C., pp. 228-229; as to maritime liens in Indonesia, see R.N. Hornick, "Indonesian Maritime Law" (1976) 8 (No. 1), J.M.L.C., pp. 78-79.

91. The Colorado [1923] P. 102 (C.A.).

92. The Zigurds [1932] P. 113 (C.A.).

93. In the Draft Admiralty Bill 1985, clause 17 (2), a maritime lien is stated to include a lien for salvage, damage, wages of the master or crew member of a ship, or master's disbursements.

Owing to the absence of Australian authorities on the subject, an insight into the above problems may be gained by analysing certain British Commonwealth cases. This body of judge-made law has been barely touched by legislation.

With rare exception, for almost eight decades, judges were content to deal with conflict of laws cases by relying on the proper law and the lex fori. By the rule of conflict of laws, where a claim pursued in an English court is acquired under a foreign legal system, the substantive right is usually determined according to the foreign law as the proper law.<sup>94</sup> Thus if by a foreign law, a particular transaction - by whatever name it may be called - gives rise to a right to or an interest in a maritime property, a court seized of the case would take cognizance of it as a maritime lien. The rule that the nature of a claimant's right should be governed by the proper law appears to have been adopted by the English Court of Appeal in The Colorado.<sup>95</sup> A French ship was arrested in England in an admiralty action in rem, and sold. The competing creditors were the Cardiff necessities men and a foreign bank claiming under a French hypothèque. It was ascertained that, by French law, claimants under a French hypothèque were mortgagees who had the equivalent of a jus in rem, which gave them a limited right to follow the res into the hands of a subsequent purchaser. Although such a right was admittedly not capable of exact description in terms applicable to well-recognized English rights, it was held to possess attributes which entitled it to rank in the same class as a maritime lien or an English mortgage. In affirming the trial court decision, the English Court of Appeal unanimously held that the English necessities men were postponed to the French hypothécaires.

About half a century later, The "Ioannis Daskalelis"<sup>96</sup> involving American necessities men and Greek mortgagees went on appeal to the

94. Jean-Gabriel Castel, Cases, Notes and Materials on the Conflict of Laws (1960), pp. 340-341; Cheshire's Private International Law (8th ed. 1970), p. 676.

95. [1923] P. 102 (C.A.).

96. 32 D.L.R. (3d) 571; [1974] 1 Lloyd's Rep. 174.

Supreme Court of Canada. It was not disputed that, by American law, the necessities men had acquired a maritime lien on the ship in respect of the costs of necessary repairs effected thereto in America. The mortgagee of the defendant ship, which was registered in Greece, was not by Greek law entitled to a maritime lien on the ship. Ritchie, J., appeared to follow the English Court of Appeal decision in The Colorado when he said:<sup>97</sup>

"[W]here a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English Courts will recognize it and will accord it the priority which a right of that nature would be given under English procedure."

He allowed the appeal and held that a claim for necessary repairs in the United States, carrying a maritime lien, had priority over a mortgage.

In 1978, the Singapore Court of Appeal heard on appeal the case of The "Halcyon Isle".<sup>98</sup> The facts were rather similar to those of The "Ioannis Daskalelis", except that the ship was a British vessel and the mortgagees were an English company. Following the judgment of Ritchie, J., Wee, C.J., held that the American ship repairers, who by the application of the proper law had a valid maritime lien, would rank above the mortgagees as claimants. He stated the effects of the Canadian judgment upon Singapore courts in the following terms:<sup>99</sup>

"A decision of the Supreme Court of Canada, particularly a unanimous decision, is of the highest persuasive authority on questions of admiralty jurisdiction, maritime law and priorities. This is so because historically our two countries have inherited the law on these matters from the law of England and the law of our two countries has developed in conformity with and to preserve uniformity with the law of England on these matters."

For a number of reasons, the approach adopted by the Courts of Appeal in the two British Commonwealth countries<sup>1</sup> would have unjust

97. *Ibid.*, p. 576; see also The "Halcyon Isle" [1980] 3 All E.R. 197, p. 205.

98. [1978] 1 M.L.J. 189.

99. *Ibid.*, p. 193.

1. Their Lordships, however, considered that in The "Ioannis Daskalelis" [1974] 1 Lloyd's Rep. 174, the judgments in The Colorado [1923] P. 102 were misunderstood by the Supreme Court of Canada: The "Halcyon Isle" [1980] 3 All. E.R. 197, p. 205 (P.C.).

results. First, a claim acquired by a person under a foreign system, e.g. American law, which recognises twice as many classes of liens as English law, will often entitle him to rank in priority to another creditor whose claim arises under English law. The creditor, whose claim is by the proper law accorded a lien, has the distinct advantage of being able to choose to institute in rem proceedings in a forum where the other competing claim is not protected by a lien. Second, as between the lienee and the shipowner, the proper law may fairly determine the substantive rights of the former. But it is grossly inequitable to let the same proper law dominate the outcome of a dispute involving another person who is enforcing a right acquired under a totally unrelated transaction subject to a different law. Third, a maritime lien is a secret charge on the res. It is hardly reasonable to expect a prospective mortgagee or financier to make enquiries in every jurisdiction under which the ship has traded in order to ensure that no lien has attached to her. It is obvious that the "proper law" approach imposes unrealistic demands on prospective creditors to make such investigations. The value of a ship as security for loans and the supply of necessities on credit will greatly diminish, particularly in those legal systems where such transactions confer no maritime liens. Fourth, in confining the role of the lex fori to such matters as remedy, procedure and priority, the substantive rights allegedly acquired under a foreign law may be given priority over rights derived from similar transactions under local law.

On appeal to the Privy Council, the Singapore Court of Appeal decision in The "Halcyon Isle" was reversed.<sup>2</sup> In delivering the majority judgment, Lord Diplock held that the mortgagees were entitled to priority. In several respects, the judgment is a historic event in that it changes what would otherwise have been an undesirable development in the law of maritime liens. The trend, if allowed to continue, would have serious implications for mortgagees, ship-repairers and suppliers of necessities in all those countries where their rights and remedies are largely based on English law. It has been pointed out that the "proper law" approach would result in the rights of such creditors, though contracted under the municipal law of the forum,

2. [1980] 3 All. E.R. 197. See A.M. Tettenborn, "Maritime Securities and the Conflict of Laws - Some Problems" [1980] 4 L.M.C.L.Q. 404.



being postponed to similar rights acquired under foreign laws. The reason is that by foreign laws such rights often carry maritime liens.

Lord Diplock avoided the complications that resulted from the rules of conflict of laws by subjecting competing claims, whether acquired under foreign laws or otherwise, to one law, *i.e.* the lex fori. By this method, parties to proceedings in rem are required to establish that the transactions - by whatever system of law they may have arisen - fall within the classes of claims recognised by the lex fori. The problems posed by the infinite variety of claims, each with its peculiar incidents, are thus resolved. This is done by requiring them to be put into the corresponding maritime-claim slots, with the order of priority, as provided by the law of the forum. Lord Diplock dealt with the issue on the basis that both the supply of necessities and the mortgage were effected in Singapore. He said:<sup>3</sup>

"...the question whether or not in the instant case the necessities men are entitled to priority over the mortgagees in the proceeds of the sale of the "Halcyon Isle" depends on whether or not if the repairs to the ship had been done in Singapore the repairer would have been entitled under the law of Singapore to a maritime lien on the "Halcyon Isle" for the price of them. The answer to that question is that they are not. The mortgagees are entitled to priority."

The Privy Council decision has extended the role of the lex fori to matters of jurisdiction and substantive right, including the question whether a particular claim is secured by a maritime lien.

In today's competitive business world, the decision has far-reaching benefits for many ship-related industries in the British Commonwealth, *e.g.* credit finance, shipbuilding, ship repairing and chandling. Presumably, it will be followed by the majority of, if not all, the courts in the British Commonwealth.

The question of interest for us is, what stand does Australia take? There are several reasons why the "lex fori"<sup>4</sup> method is preferred. One can see no policy grounds on which the State and

3. Ibid., p. 208.

4. The Privy Council and the High Court of Australia have applied the proper law of the contract to determine the substance of the obligation where foreign law elements are involved: Bonython v. The Commonwealth of Australia [1951] A.L.R. 37 (P.C.); Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society (1934) 50 C.L.R. 581.

Commonwealth Parliaments may step out of line with the rest of the British Commonwealth. Apart from the distinct merits of simplicity, which the "lex fori" method offers, and uniformity with the United Kingdom's law, Australia will benefit from the protection conferred on her ship-related industries. Adoption by Australian courts of the "lex fori" method will be in line with Commonwealth legislation. The policy is that liens for the wages of seamen and apprentices and liens for masters' wages and disbursements shall have priority over all other liens.<sup>5</sup> On the other hand, when an Australian or foreign ship is proceeded against in a country outside the British Commonwealth the application of the "lex fori" method may give rise to a different result.

### 3. At International Level

It is undeniable that at the heart of the proper law approach or the "lex fori" method is the object of doing even-handed justice between competing creditors of shipowners with a limited fund. Obviously whatever rules of conflict of laws employed, whether in civil law or common law jurisdictions, will have their shortcomings. The facts of The Colorado<sup>6</sup> furnish an interesting example. Claimants under a French hypothèque were treated by all the English Court of Appeal judges to be on par with mortgagees under English law. But English necessities men were denied the benefit of the priority which they had under French law over the hypothécaires!<sup>7</sup> In The Tagus,<sup>8</sup> the dispute concerned the ranking of mortgagees and the master of an Argentine ship. The master claimed a lien for wages earned and disbursements expended in the course of several voyages. By Argentine law, his right to the lien for these sums was restricted to the last voyage only. The English court applied the lex fori in its wide scope and gave the master the benefit of an English maritime lien for all the wages earned and disbursements incurred. Further inequity of the methods used by the court is exemplified by The Zigurds.<sup>9</sup>

5. See Navigation Act 1912-73 (Comth.), ss. 83 (2) and 94 (1) and (2).

6. [1923] P. 102 (C.A.).

7. Ibid., p. 109.

8. [1903] P. 44.

9. [1932] P. 113.

By the German Commercial Code, German necessities men, as "ships creditors", had rights analogous to those given by a maritime lien if the ship was arrested in Germany. Their claim, as creditors, of a higher order than either necessities men or mortgagees under English law, was rejected.

The first attempt to deal with the problems of conflicting rights relating to the ship, which arise under different national systems of law, was the formulation of the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1926. It was ratified, or acceded, to by twenty-one countries and signed by eleven other countries, including the United Kingdom.<sup>10</sup> The Convention, of which Australia is not a signatory, sought to confer maritime liens on not fewer than twenty-three types of claims.<sup>11</sup> For a number of reasons, the United Kingdom never ratified the Convention. Member States would be required to create and recognize maritime liens in favour of necessities men and many other classes of creditors. It would result in a wide departure from the general law of the sea. This move had already occurred in many western countries, e.g. France and the United States, whose domestic laws provide for the enforcement of maritime liens for a wide range of claims.<sup>12</sup> Britain's non-ratification ensured that the pre-1926 maritime law on the subject would be retained in the British Commonwealth.

The 1967 Convention represented a second international effort to unify the law relating to maritime liens and mortgages.<sup>13</sup> The Convention signed by twenty-three countries, including Britain but not Australia, has not entered into force. Compared with those of its 1926 predecessor, its changes are less extensive in that only four new

10. Register of Texts of Conventions and Other Instruments concerning International Trade Law (United Nations, 1971), vol. 1, p. 245. See also The Tolten [1946] P. 135, p. 152, per Scott, L.J.

11. See Article 2.

12. The "Halcyon Isle" [1980] 3 All. E.R. 197, p. 206.

13. International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1967, op. cit., p. 268.

classes of maritime liens were created. These are claims in respect of waterway dues, pilotage dues, loss of life or personal injury and general average contribution.<sup>14</sup> Occasionally legislation in British Commonwealth countries which creates port and canal authorities also confers on them maritime liens for the collection of waterway and pilotage dues. The 1967 Convention meets a number of the vital needs of the world's maritime industry. One key advantage is that it provides uniform rules relating to maritime liens and other claims and their order of priority. A great deal of intelligence-gathering work by prospective creditors and expensive, time-consuming litigation that follows can be avoided. It is suggested that, after it has come into force on the receipt of the requisite ratifications or accessions from Nation States, Australia should consider taking a similar step with the view to giving statutory effect to it.

#### VII. EXTINCTION OF MARITIME LIENS

Less than eight decades ago, admiralty proceedings in rem to enforce maritime liens were virtually not confined to any fixed period. There were no Australian limitation statutes applicable to such actions. The principle that the rights or privileges after attachment will travel with the res into whosoever's possession the res may come originated in Admiralty Court decisions. Its operation with relation back to the moment of the attachment is seen in the case of The Ship "Strandhill" v. Walter Hodder Company.<sup>15</sup> By American law, the ship then registered in America as the Lincolnland was subject to a maritime lien for necessities supplied to her in America. Before the admiralty action was commenced, she had been sold, her name changed, and she had been registered as a British ship. The Exchequer Court of Canada recognised the right acquired under American law and allowed the necessities men to enforce it. Naturally, having been allowed to bring into existence such a far-reaching doctrine of proprietary rights, the courts were left by the British Parliament with the responsibility of working out their limits.

In carrying out this task, Admiralty Court judges followed the

14. Article 4 para. 1.

15. [1926] S.C.R. 680, p. 685, per Necombe, J.

concepts of equity. The equitable principle of laches was applied to bar plaintiffs from enforcing their claims in certain situations. Maritime liens are not enforceable where there is lack of reasonable diligence in prosecuting the claims or where injustice will result.

In The Chieftain,<sup>16</sup> a master was held not to have lost his wage lien upon the ship by delaying to enforce his claim for ten months, although he had had the opportunity to do so. Moreover, a master's release of his personal claim against the shipowner for wages does not operate to release the ship from his wage lien. A lien for master's wages and disbursements incurred is lost where the master, instead of receiving payment in cash, has agreed to leave the money at interest with the shipowners or their agents. Apparently, an Admiralty Court will refrain from penalising a master whose mistaken but honest belief is the cause of the delay. The authority for this view is found in The Fairport.<sup>17</sup> A master was not prevented from enforcing his disbursement lien. The delay was due to his belief that the shipowner would discharge his personal liability under a bill of exchange which the charterer had dishonoured. The United Kingdom and Australian Parliaments have been content to let their respective courts adjudicate upon issues relating to the enforceability of master's liens for wages and disbursements.

Bottomry bonds, fallen into disuse for over a decade, constitute another class of claim which is outside the limitation statutes. They are unenforceable unless they are proved to be of recent origin and pursued with very active diligence. This watchful attitude of the courts had resulted from the nature of bottomry transactions which afforded opportunities for collusion.

Under English law, the six-year limitation period within which actions for seamen's wages had to be commenced was first introduced

16. (1863) Brown & Lush. 212; 167 E.R. 340.

17. (1872) L.R. 3 A & E. 48. In The Fairport (1882) 8 P.D. 48, although the disbursements were incurred in April 1880, it was held that there was no want of active diligence when the suit was instituted by the master in November, 1882.

by a statute of Anne.<sup>18</sup> Accordingly, an admiralty action in rem to enforce a maritime lien for wages would be barred after six years. In Australia, seamen's wage claims are not subject to any limitation period imposed by Commonwealth legislation. Only the State Parliaments of New South Wales<sup>19</sup> and Tasmania<sup>20</sup> have expressly provided that seamen's wage claim must be brought within a period of six years. The inference to be drawn is this. In Victoria, Queensland, Western Australia and South Australia where the six-year limitation period is not applicable, the enforceability of wage liens will be determined by the doctrine of laches. This inconsistency in State laws may in some cases prove fatal to admiralty actions in rem brought by unwary seamen.

Prior to the passing of the Maritime Conventions Act 1911 (U.K.), in applying the doctrine of laches to salvage and collision suits, English admiralty courts often took a sympathetic view of the extenuating factors in favour of claimants. This posture resulted in prolonging the limitation period, particularly in relation to collision suits, to the detriment of other creditors. It will be recalled that by English law damage lienees rank in priority to other claimants except subsequent salvors. In The Europa, a damage lien was successfully prosecuted after an intervening period of three years. The criterion to be satisfied was couched in the following terms:<sup>21</sup>

"Reasonable diligence means not the doing of everything possible but that which, having regard to all the circumstances, including consideration of expense and difficulty, can be reasonably required."

That judicial discretion in favour of damage claimants might be exercised beyond the bounds of reason is seen in the pre-1911 case of

18. 4 Anne, c. 16, s. 17: suits and actions for seamen's wages in the Court of Admiralty had to be commenced within six years: see also Limitation Act 1939 (U.K.) (2 & 3 Geo. VI, c. 21), s. 2 (6).

19. Limitation Act 1969 (N.S.W.), s. 22 (1); otherwise not applicable to a cause of action in rem within the admiralty jurisdiction.

20. Limitation Act 1974 (Tas.), s 8 (1); otherwise not applicable to a cause of action in rem within the admiralty jurisdiction.

21. (1863) BR. & L. 89, 89 (P.C.), per Lord Kingsdown, Lord Chelmsford and Lord Wensleydale.

The Kong Magnus.<sup>22</sup> The collision, in which a Norwegian steamship wrongfully sank a British vessel, occurred in 1878 in the North Sea. Although the former had been to British ports about forty-seven times, she was not arrested until 1889, i.e. eleven years later! The plaintiffs were held entitled to prosecute their claim for damages. Trial judge Sir James Hannen (President) considered the particular circumstances as to whether it would be equitable to entertain the suit. They included the period of time that had elapsed since the collision, the opportunities of arresting the vessel, the loss of witness and evidence, and the change of property. The facts exemplify the difficulties faced by the defendants, despite certain presumptions made in their favour, in establishing to the court's satisfaction that the merit of the case should not be gone into.

Britain gave statutory effect to the 1910 Convention on salvage at sea and the 1910 Convention on collisions.<sup>23</sup> The other maritime nations followed suit by adopting a two-year limitation period for claims and liens arising from salvage services and also collision damage. It is interesting to note that Australia's accession on 9th September, 1930, was made in relation to both the 1910 Conventions.<sup>24</sup> She prudently incorporated, in section 396 (1) of the Navigation Act 1912-73 (Comth.), provisions similar to those in the 1911 Act (U.K.). Thus admiralty actions in rem to enforce any claim or lien for salvage or collision damage under the Commonwealth Act must be brought within a period of two years. Where, however, the actions are governed by State laws, as in cases of salvage services rendered to, or of collision involving, intra-State trading ships in State waters, anomalies may arise. Only the Parliaments of Tasmania,<sup>25</sup> Western Australia<sup>26</sup> and New South Wales<sup>27</sup> have incorporated in their legislation the two-

22. [1891] P. 223.

23. See preamble to Maritime Conventions Act 1911 (U.K.).

24. N. Singh, International Maritime Law Conventions (1983), vol. IV, pp. 2958 and 3088.

25. Limitation Act 1974 (Tas.), s. 8 (2) and (3).

26. Supreme Court Act 1935-79 (W.A.), s. 29.

27. Limitation Act 1969 (N.S.W.), s. 22 (2) and (3).

year limitation period. Presumably the courts in the other States will continue to apply the age-old doctrine of laches.<sup>28</sup>

Where the statutory rule applies, the court is also empowered to extend the period to such an extent and on such condition as it thinks fit. In The Alnwick,<sup>29</sup> the plaintiff's husband as a passenger in a foy boat was killed on 28th April, 1962, in a collision between the boat and the tug Alnwick. The accident happened when the boat was passing between the sterns of the Alnwick and the Norwegian vessel Braemar. On 3rd December, 1963, the writ claiming damages against the Alnwick was issued. The defence of the Alnwick, which should have been produced on 6th March, 1964, was not delivered until 2nd May, 1964 - more than two years after the collision date. In an unexpected move, the Alnwick in her defence made allegations of negligence against, and placed blame on, the Braemar for the cause of the death. Hewson, J., held that action was not maintainable against the Braemar, the second defendants, as the proceedings had not been commenced against them within two years as required by section 8 of the Maritime Conventions Act 1911 (U.K.). In the appeal, their Lordships held that the following factors were "good and substantial reasons to justify" granting the time extension sought - namely:

1. the failure of the Alnwick to deliver the defence on the due date;
2. the allegations made in the Alnwick's defence as to the negligence of the Braemar;
3. the plaintiff's risk of losing the case unless such allegations were challenged; and
4. the entitlement of the Alnwick, if judgment went against her, to seek contribution against the Braemar within one year under section 8 of the 1911 Act (U.K.).

There are situations where creditors are, either temporarily or

28. As to the proposed change in the law, see Draft Admiralty Bill 1985, clause 38, *infra*.

29. [1965] 2 All E.R. 569 (C.A.). In The Niceto de Larrinaga [1965] 2 All. E.R. 930, it was held that the Maritime Conventions Act 1911 (U.K.), s. 8 does not bar claims for loss of life of, or personal injury to, a person carried on board the vessel against whose owners the claim was made.



indefinitely, precluded from instituting proceedings in rem. Suppose that a ship, while privately owned, becomes subject to a maritime lien, and is then chartered by demise to, or acquired as the property of, a State or the Commonwealth Government.<sup>30</sup> It is submitted that section 405A (1) of the Navigation Act 1912-73 (Comth.) will cease to operate as a bar to an action in rem after the demise charter has expired or after she has once again reverted to private ownership. The court should be prepared to grant a time extension, if necessary. The same reasoning should apply where the ship, encumbered with a lien, is meanwhile under a demise charter or transferred to a foreign sovereign or foreign government. It is submitted that in such cases the maritime lien being inchoate is not extinguished but held in abeyance.<sup>31</sup>

Section 324 (1)<sup>32</sup> of the Navigation Act 1912-73 (Comth.) provides a statutory method for the master or any of the crew, as salvor, to abandon voluntarily his lien on the wreck alleged to have been salvaged. The wreck is discharged from the encumbrance where a written agreement, attested by two witnesses, is entered into to abide the decision of a Federal or State Court on the matter, and security to the amount agreed on by the parties thereto is given. Under the provision the security furnished by the wreck owners is a substitute for the lien. The object is to ensure that salvors will be paid if they are

30. As regards proceedings in rem against any ship or other property belonging to Her Majesty or the Crown, including the question as to whether any lien could attach to such ship or property, see Crown Proceedings Act 1947 (Imp.), s. 29.

31. Cf. In The Tervaete [1922] P. 259 collision damage was occasioned by a foreign state-owned vessel. It was held that no maritime lien attached to the vessel. Accordingly, if the vessel was subsequently sold into private ownership, she could not be proceeded against in any action in rem.

32. It is modelled on Merchant Shipping Act 1894 (Imp.), s. 554.

found legally entitled to salvage reward.

Under English admiralty law, though the matter has not yet been considered by any Australian court, a maritime lien is extinguished where bail or security is given to prevent the arrest or secure the release of the ship in an admiralty action in rem.<sup>33</sup> Another rule long established by the Admiralty Court in the exercise of its jurisdiction that is applicable in Australia is this. The arrest and sale of a ship by a court of competent jurisdiction in proceedings in rem will result in extinguishing the liens attached thereto.<sup>34</sup> In the current state of English authorities, there is some doubt whether, apart from the case of bottomry, the voluntary assignment of a lien without the sanction of a court will operate as an extinction.<sup>35</sup> An American court has held that there could be no maritime lien for wharfage where the ship was withdrawn from navigation.<sup>36</sup> It is obvious that destruction of the res subject to the liens puts an end to the right to institute proceedings in rem against it.

#### VIII. CONCLUSION

The law currently in force in Australia relating to maritime liens is substantially similar to that of the United Kingdom. By judicial process and also Commonwealth and State legislation, there has been continual and systematic reception of the principles of English maritime law.

For the purpose of the proposed admiralty jurisdiction, clause 17 (2) of the Draft Admiralty Bill 1985<sup>37</sup> defines "maritime lien" as a

33. The Christiansbory (1885) 10 P.D. 141 (C.A.); The "Wild Ranger" (1863) Br. & L. 84; The Goulandris [1927] P. 182. In the Reinbeck (1889) 6 Asp. Mar. Law Cas. 366 (C.A.), it was held that plaintiffs might still resort to British courts though bail was voluntarily put in by defendants in a foreign court.

34. Castrique v. Imrie (1870) L.R. 4 H.L. 414; The Charles Amelia (1868) L.R. 2 A & E. 330.

35. The Petone [1917] P. 198. After exhaustively reviewing the previously authorities, Hill, J., held that a person who without the sanction of court voluntarily pays off a maritime lienor is not entitled to the benefit of the lien. In Rhind v. The "Zita" (1924) Gaz. Law Rep. (N.Z.) 7, the plaintiff was entitled to the benefit of the master's statutory lien in respect of advances made for wages and necessities on the ground that he was not a volunteer.

36. The General Lincoln, D.C. Md. 1928, 24 F. 2d. 441.

37. The proposed admiralty jurisdiction is considered in Chapter Nine.

reference to a lien for salvage, damage, wages of the master or a crew member, or master's disbursements. All these classes of liens have long been incorporated as part of Australian law.

As a result of the 1980 Constitutional Agreement, the legislative jurisdiction of each State Parliament has been extended beyond the low-water mark to the adjacent coastal waters.<sup>38</sup> It is vital for State laws on the subject throughout Australia to be uniform. Consistency is lacking so long as the legislation in Tasmania,<sup>39</sup> Queensland<sup>40</sup> and New South Wales<sup>41</sup> dealing with contributory negligence occurring on land is to be applied to collisions between ships at sea involving contributory negligence. The old admiralty rule of equal division of loss without regard to the extent to which the parties involved were in fault is long obsolete.<sup>42</sup>

In Queensland,<sup>43</sup> Victoria<sup>44</sup> and South Australia,<sup>45</sup> there is apparently no statutory period of limitation relating to actions *in rem* for enforcing maritime liens for salvage and damage.<sup>46</sup> Uncertainty and disharmony will arise due to the operation of the doctrine of laches. Similar problems exist in connection with claims for seamen's wages which appear to fall outside the scope of the limitation statutes in these States. It is imperative for the Parliaments in these States to

38. Coastal Waters (State Powers) Act 1980 (Comth.), s. 5; Constitutional Powers (Coastal Waters) Act 1979 (N.S.W.), s. 5; Constitutional Powers (Coastal Waters) Act 1979 (S.A.), s. 5; Constitutional Powers (Coastal Waters) Act 1980 (Vic.), s. 5; Constitutional Powers (Coastal Waters) Act 1979 (W.A.), s. 5; Constitutional Powers (Coastal Waters) Act 1980 (Qld.), s. 5.

39. See Supreme Court Civil Procedure Act 1932 (Tas.). This Act and the following two Acts contain no provisions which expressly apply to collisions at sea.

40. See Supreme Court Act 1867 (Qld.) (31 Vic. No. 23).

41. See Supreme Court Act (N.S.W.) (No. 52 of 1970).

42. Hay v. Le Neve, 2 Shaw Sc. App. 395.

43. Limitation of Actions Act (Qld.) (No. 75 of 1974).

44. Limitation of Actions Act (Vic.) (No. 6295 of 1958).

45. Limitation of Actions Act 1935-1975 (S.A.).

46. Under the Supreme Court Act 1935-1979 (W.A.), s. 29, the two-year limitation period imposed for claims for collision damage and injuries does not apply to claims for salvage; for position in New South Wales and Tasmania, see Limitation Act 1969 (N.S.W.), s. 22 (2) and Limitation Act 1974 (Tas.), s. 8 (2).

bring the law into line with the provisions of the Navigation Act 1912-73 (Comth.)<sup>47</sup> and the international conventions.<sup>48</sup> The Draft Admiralty Bill 1985<sup>49</sup> seeks to harmonise the law relating to the limitation periods, and to remove some of the difficulties. It appears that under clause 38 (1) (b) a proceeding on a maritime lien may be brought within a three-year period. When given effect, it will fill the existing gaps in the State laws. We have noted that the legislation of Queensland, South Australia, Victoria and Western Australia makes no provision relating to proceedings on maritime liens. Another object of clause 38 is to promote certainty. A claim brought within a period provided under the clause will not be affected by the operation of the doctrine of laches. The proposed legislation will give rise to some inconsistency with the limitation periods under the Maritime Conventions Act 1911 (U.K.)<sup>50</sup> An advantage is that maritime claims, which are statute-barred in other jurisdictions, may be enforced in the courts of the four Australian States.

One difficulty concerns the ranking of maritime liens inter se and in relation to certain claims giving rise to possessory liens. Another related problem is the secret nature of the encumbrances constituted by maritime liens which are mainly within the knowledge of the shipowners. It is submitted that the law should impose on them a duty of disclosure. For example, under Australian law, ship mortgagees, necessaries men, salvors and damage claimants rank after crew members. Prospective ship mortgagees and necessaries men, who look to the ship as security, can do little to ascertain whether any maritime liens have attached to her.<sup>51</sup> It is suggested that to promote honest dealings legislation should be introduced requiring any

47. S. 396 (1).

48. International Convention for the Unification of Certain Rules with respect to Collisions between Vessels, Brussels, 23rd September, 1910; Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Brussels, 23rd September, 1910. Britain acceded to both Conventions on behalf of Australia on 9th September, 1930.

49. See Chapter Nine.

50. As to the limitation periods applicable to claims for collision damage or injuries and salvage, see s. 8; and Navigation Act 1912-73 (Comth.), s. 396 (1).

51. Since maritime liens could have arisen and attached to the ship under any system of law, there is no way of checking their existence.

existing liability incurred by the ship or any claim against her, whether or not it carries any maritime lien, to be entered in the Register at the Shipping Registration Office. The availability to the public of information relating to such liability or claim will greatly alleviate the risk of extending credit facilities to the ship or of making advances to her owners on a ship mortgage.

It is self-evident that maritime liens are extinguished by the loss or destruction of the res. When this event occurs, the ship-owners will usually be able to recover compensation under some insurance policy. The insurance moneys are not subject to maritime liens. Consequently, the former mortgagees and lienees will be relegated to the position of general creditors. Their claims may be postponed to those of other creditors of the shipowners. The result is a diminution in the amount recoverable, particularly where the shipowners are insolvent. It is suggested that legislation is needed. It should provide that the compensation recoverable, whether under an insurance policy on the ship or in an action against another ship for wrongful damage caused, shall constitute a fund to meet the existing claims in the same order of ranking as before the ship was lost or damaged.

It is uncertain as to what rule of conflict of laws Australian judges will apply in those cases where rights in a ship are allegedly acquired by competing creditors under different systems of law. Whether the High Court of Australia applies the proper law - following the Supreme Court of Canada decision<sup>52</sup> and the Singapore Court of Appeal decision<sup>53</sup> - or the lex fori as in the Privy Council case of The "Halcyon Isle"<sup>54</sup> will not provide an equitable long-term answer. Courts in non-British Commonwealth countries are bound by different rules. Creditors will continue the practice of seeking out a forum for instituting proceedings in rem that will give to their claim the highest order of priority possible. The problem concerns not just Australia or the British Commonwealth countries but all the maritime nations of the world. As an interim measure, Members of the

52. The "Ioannis Daskalelis" [1974] 1 Lloyd's Rep. 174.

53. The "Halcyon Isle" [1978] 1 M.L.J. 189.

54. [1980] 3 All. E.R. 197 (P.C.).

United Nations should adopt, and give statutory effect in their respective States to, the International Convention for the Unification of Certain Rules relating to Maritime liens and Mortgages, 1967.

## CHAPTER EIGHT

### LIMITATION OF LIABILITY

#### I. INTRODUCTION

Steady increase over the centuries in the carrying capacity, speed and numbers of sea-going ships has produced a corresponding rise in claims against shipowners. Often the claims are rendered devastating by many factors. These factors include the loss of or damage to high-valued cargo, personal injuries to or deaths of persons, extensive damage to port or harbour installations, the sinking of other ships, oil pollution damage and clean-up costs. It is true that marine insurance and protection and indemnity clubs have played a significant role in reducing the financial risks and losses borne by shipowners and other persons. International trade policy, the desire to promote maritime commerce, the prohibitive costs of insurance services and the need to lower freight charges have led to efforts to find some practical solution to the problems faced by shipowners and others.

Maritime transportation is a venture. By its very nature, the two parties, namely, the shipowner as provider and the shipper or passenger as user of the services, are subjected to certain risks of damage or injury. The early English legislators seized upon an equitable solution to the problem. The statutory limitation of liability was really the provision of a formula to apportion the risks between the two parties to the venture. The principle of strict and unlimited liability relating to common carriers had to be modified. The business of carrying goods or providing transport services became separated from insuring the safety of the goods or passengers carried. A shipowner can only be held responsible for loss, damage or injury caused as a result of his or his employees' negligence.

In this Chapter, we shall look at how the risk-sharing proposition was first employed in the eighteenth-century shipping legislation. The concept had been consistently endorsed by successive British Parliaments before it was adopted by international maritime bodies. Although in some of the international shipping conventions, the time-honoured expression "actual fault or privity of the shipowner" is not used, a similar principle of "risk-sharing" as a means of limiting the liability of the carrier or shipowner is applied. For

example, the Hague Rules scheduled to the Sea-Carriage of Goods Act 1924-73 (Comth.) limit a carrier's liability in normal circumstances to \$A 200 per package or unit of the goods lost. A remarkable, indeed new, form of risk apportionment in use today is found in the Brussels Protocol 1968 and the Convention on Limitation of Liability for Maritime Claims 1976. In each case, the limitation of liability applies unless the personal act or omission is proved to have been committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Attention is focussed on the various problems arising out of the application of Australian and the United Kingdom's legislation on the subject, and on the changes made over the years to re-distribute the risks. These legislative measures extend the benefit of limiting liability to a larger group of persons, e.g. ship charterers and operators. They also limit the rights of owners of property damaged, e.g. by oil pollution, to partial compensation. Included in the study are situations where the benefit of limiting liability are held to be unavailable and the ways in which Australian and the United Kingdom's laws differ.

## II. CONTRACTS OF CARRIAGE

### 1. Bill of Lading Contracts

We have looked at the conditions to be satisfied before the admiralty jurisdiction under section 6 of the Admiralty Court Act 1861 (Imp.) can be exercised. The amount of compensation recoverable against the carrying vessel is now considered.

Since section 6 only applies to goods carried by ships into the Commonwealth or an Australian State, provisions of the Hague Rules which have the force of law in foreign ports of shipment are solely relevant. Section 4 (5) of the Carriage of Goods by Sea Act 1936 (U.S.) reads:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment in the bill of lading."

It is clear that the amount recoverable in respect of each package



lost or damaged depends on the particular currency involved and also the rate of exchange. For example, "£100 per package or unit" in the old Carriage of Goods by Sea Act, 1924 (U.K.) was replaced by the new formula "equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight...whichever is higher."<sup>1</sup> By the Carriage of Goods by Water Act, 1936 (Can.),<sup>2</sup> the expression is "five hundred dollars per package or unit, or the equivalent of that sum in other currency." This limit of liability is not always adhered to. The courts have in different ways struck down attempts by ship-owners as carriers to lessen their liability.

The imprecision of the terms "package" and "unit" in Article IV rule 5 of the Hague Rules has been exploited by shipowners and carriers. By the ingenious use of the "full container load" (F.C.L.) system, a new pattern of packing and shipping goods was introduced. For reasons of expediting handling, preventing pilferage, protecting goods from transit damage and obtaining improved freight rates, shippers favour the F.C.L. system. A shipper may use a large container to consolidate many cartons or items and ship it under a bill of lading as a single package. Subject to certain conditions being met, the courts have given effect to the agreed adjustments made by shippers within the meaning of the word "package".<sup>3</sup> Any agreement which lessens the liability of a shipowner as carrier other than by increasing the package dimensions is rendered invalid.<sup>4</sup>

International importers under C.I.F. and F.O.B. contracts often require the quantity of goods shipped to be specified in the documents of title.<sup>5</sup> American and Canadian decisions have safeguarded

1. The Brussels Protocol 1968 (The Visby Rules), Article 2, (a); see also Carriage of Goods by Sea Act 1971 (U.K.), Article IV rule 5 (a). The conversion rate is given in the Carriage of Goods by Sea (Sterling Equivalents) Order 1977, S. I. No. 1044; see also the comments of N.R. McGilchrist, "The New Hague Rules" [1974] 3 L.M.C.L.Q. 255.
2. R.S.C. 1970, c. C. 15, Article IV rule 5.
3. Insurance Co. of North America v. Japan Line Ltd. [1974] A.M. C. 2443. Also in Primary Industries Corpn. v. Barber Lines A/S and Skilos Tropic [1975] 1 Lloyd's Rep. 461, each bundle comprising twenty-two tin ingots treated as a "package".
4. Article III rule 8. Australia has not given effect to Brussels Protocol 1968.
5. In these cases of documentary sales, which take place prior to the arrival of cargo, it is vital that the number of items and their description be clearly stated in the documents.

the interests of assignees and holders of bills of lading by giving Article IV rule 5 a narrow construction. Enumeration by a shipper or his agent in the bill of lading of the cartons or items stowed in a container is given effect in the literal sense. Thus in Leather's Best v. S.S. Mormaclynx,<sup>6</sup> Cameco v. S.S. American Legion<sup>7</sup> and J.A. Johnston Co. v. The Tindelfjell,<sup>8</sup> the bills of lading stated that the containers were "said to contain" a specified number of cartons. The courts rightly took the view that, in accepting the number of cartons as described, the carriers had agreed to the limitation of liability on the basis that each carton was a package. These decisions uphold the principle behind the Hague Rules.<sup>9</sup>

A similar approach to the problem was taken by the High Court of Australia in William Holyman & Sons Pty. Ltd. v. Foy & Gibson Pty. Ltd.<sup>10</sup> A package of women's underwear valued at fifty-seven pounds was shipped under a bill of lading, subject to the Sea-Carriage of Goods Act 1924 (Comth.), from Melbourne to Hobart. It was not delivered. Here the "agreed adjustments" did not relate to the meaning of package but sought to reduce the carrier's liability. A clause in the bill of lading stated:

"It is mutually agreed that the value of each package or parcel receipted for...does not exceed the sum of £5 unless otherwise stated therein...."

In affirming the Supreme Court of Victoria judgment in favour of cargo consignees for the full value, the High Court held that the clause was void on the ground of its inconsistency with Article IV rule 5 of the Hague Rules. Moreover, by Article IV rule 8, any clause or agreement in a contract of carriage lessening the liability, otherwise than as provided by the Rules, of "the carrier or the ship" for

6. [1971] A.M.C. 2383. The words "sealed container said to contain 99 bales of leather" were inserted by shipper in the bill of lading. Each bale was held to constitute a package.

7. [1975] 1 Lloyd's Rep. 295. The number of cartons packed into the container was enumerated in the bill of lading. Each carton was treated as a package.

8. [1973] 2 Lloyd's Rep. 253. In this Canadian case, two containers shipped were described in the bill of lading as containing 174 cartons and 143 cartons, respectively. Again, each carton was held to be a package.

9. See Professor J. Goldring, "The Container as a 'Package' or 'Unit' under the Hague Rules" (1973-74) 2 A.B.L.R. 127.

10. (1945) 73 C.L.R. 622.

cargo loss or damage arising from breach of the duties and obligations in Article III is rendered null and void.

The other word in Article IV rule 5, which is insufficiently clear in meaning, is "unit". Although directly related to the amount of compensation recoverable against a carrier for cargo loss or damage, it is not defined in the Hague Rules or any English or Australian cases. Professor Tetley puts forward a number of reasons to support his argument that the word "unit" in the Hague Rules means a "freight unit" and not an unpacked object.<sup>11</sup> Undoubtedly, his view is in line with the American concept. This is seen in the use of the expression "customary freight unit" in Section 4 (5) of the Rules scheduled to the Carriage of Goods by Sea Act 1936 (U.S.). Since the word "unit" is used, without qualification, in Article IV rule 5 of the Rules scheduled to the legislation enacted in British Commonwealth countries, it is unlikely that English or Australian courts will follow Professor Tetley's view by giving it a narrow meaning. For example, consistent with the use of the word "unit" simpliciter in Article IV rule 5 under the Carriage of Goods by Water Act 1936 (Can.) Canadian courts have construed it to mean "shipping unit" rather "freight unit".<sup>12</sup> The learned authors of Scrutton on Charterparties and Bills of Lading have taken a more flexible view. While recognizing that the concept of the "shipping unit", unlike the "freight unit", is not all appropriate when applied to cargo in bulk, they consider that "a possible solution is to apply the 'shipping unit' to individual articles not in packages and the 'freight unit' to bulk cargo."<sup>13</sup> That this view is more acceptable is borne out by two facts. In 1924 when the Hague Rules were adopted, long before the age of containerisation, goods were shipped in different forms. Accordingly, the two words "package" and "unit", which are not intended to be synonymous, must

11. W. Tetley, Marine Cargo Claims (2nd ed. 1978), pp. 438-9.

12. In Sept Iles Express Inc. v. Tremblay [1964] Ex. C.R. 213 and Falconbridge Nickel Mines Ltd. v. China Shipping Ltd. [1969] 2 Lloyd's Rep. 277, "freight unit" was rejected in favour of "shipping unit". See also D.F. McEwen, "Per Package Limitation - A Diverging Approach in Canadian Courts" [1976] 3 L.M.C.L.Q. 269.

13. Scrutton on Charterparties and Bills of Lading (18th ed. 1974), p. 443; see also the latest edition (19th ed. 1984), op. cit., p. 455.

be separately construed to apply to each lot, bundle or piece of the infinite range of goods shipped. This intention of the Hague Rules drafters can be inferred from Article III rule 3 (b). After the goods have been received into his charge, the carrier, his agent or the master is required to issue a bill of lading showing, inter alia, "the number of packages or pieces or the quantity or weight as the case may be." It is submitted that the same approach was followed by the drafters of the Brussels Protocol 1968. The inclusion of the words "or 30 francs per kilo of gross weight of the goods lost or damaged" brings out the point quite clearly. Thus bulk cargo can be shipped in such a way that the entire container or a large cubic measure may constitute a package or a unit, respectively. Except where the protection under the Hague Rules is rendered inoperative by an unjustified deviation or where the weight measure applies, the liability of a shipowner as carrier does not exceed the statutory maximum for each package or unit of the goods lost.

## 2. Increase of Compensation

Where the "agreed adjustments" concept applies, few Australian importers of containerised cargo shipped under the F.C.L. system or of unitised cargo will find it worthwhile instituting an admiralty action in rem.

The problems created by containerisation and the ambiguous wording of Article IV rule 5 were dealt with by the Brussels Protocol 1968 (The Visby Rules). One of the amendments that have been incorporated in the Carriage of Goods by Sea Act 1971 (U.K.) reads:

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss of or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher."

(1). The rigor of the "agreed adjustments" concept has been modified in several important ways. By the proviso, insertion in the bill of lading of the number of cartons or pieces, or the weight of, goods packed into the container will render inapplicable the "per

package" concept.<sup>14</sup> Moreover, if the alternative method of computation is more advantageous, a plaintiff in an admiralty action in rem is entitled to have the damages quantified according to the gross weight of the goods, presumably including the container.<sup>15</sup> To counter the uncertainty due to changing market value of the franc, the Carriage of Goods by Sea (Sterling Equivalents) Order 1971<sup>16</sup> was made in the United Kingdom. It specifies £447.81 and £1.34 as the sterling equivalents of 10,000 and 30 gold francs, respectively. The disadvantage, possibly injustice, of this method of conversion to a plaintiff will be discussed in due course. Australia, New Zealand, Canada and the United States are not among the ten countries which have ratified, or acceded to, the Brussels Protocol 1968.

(2). For Australian importers of goods shipped from countries, e.g. Britain, Singapore and France, which have given statutory effect to the Brussels Protocol, there is an added protection. The bills of lading covering the contracts of carriage are issued in these countries of shipment subject to the provisions of the Brussels Protocol 1968. The amendment, which is incorporated in Article IV rule 5 (e), reads:

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for...if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."

The philosophy and policy underlying the amendment have strengthened the position of assignees and holders of bills of lading in Australia. Under the 1971 Act (U.K.) an interesting distinction is made between intentional or reckless damage caused by the carrier and that attributed to his servants or agents.<sup>17</sup> Examples of the former

14. The proviso is clearly intended to give effect to the principle laid down by courts in determining when a container is not to be treated as a package; see also [Anonymous] "The Hague-Visby Rules now operative in United Kingdom" [1977] 4 L.M.C.L.Q. 512.

15. Unless, of course, the container belongs to, or has been supplied to a shipper or consignor by the shipowner as under the Full Container Load system.

16. Statutory Instrument No. 1044 of 1977.

17. Article IV rule 5 (e) and Article IV B.I.S., rule 4, Carriage of Goods by Sea Act 1971 (U.K.).

would probably include physical cargo damage or financial loss caused by on-deck carriage, delay in sailing or stowage in a hold known to the carrier of the cargo to be uncargoworthy, where these acts or operations are done on the carrier's instructions. Where the carrier is a body corporate, the instructions must have come from some fairly senior person as the alter ego of the company, e.g. the managing director or some one charged with the authority. It appears that the claimant has the onus of proving the elements required. Thus in such circumstances, the compensation recoverable by the plaintiff as bill of lading holder in an admiralty action in rem, under section 6 of the Admiralty Court Act 1861 (Imp.), is not subject to the limitation of liability. It is submitted that a similar right would be exercisable under Article VIII rule 1 of the Hamburg Rules, if they are given statutory effect and applicable to the contract of carriage.

(3). The "agreed adjustments" concept is also consistent with the proviso to the first paragraph in Article IV rule 5 of the Hague Rules. Where before shipment the nature and value of the goods are declared and inserted in the bill of lading, a plaintiff in an admiralty action in rem may recover full, and not just the limited "per package", compensation. A higher cargo valuation is only binding on the carrier or the ship if the document containing the particulars is accepted by the carrier. This is done when the master of the ship or a shipping agent signs the document and issues it to the shipper.

Paragraph three of Article IV rule 5 remedies a situation, possibly with retrospectivity, where the pre-shipment conditions, if any, are not satisfied, or the higher valuation stipulated is incorrect or too low. It is nevertheless open to the shipper and the carrier or his agent, by agreement, to fix "another maximum amount" provided it is not less than that permitted by the Hague Rules.<sup>18</sup>

The liability of the carrying vessel to pay damages beyond the

18. For provisions which strike down agreements aimed at reducing the ship's or carrier's liability below the statutory limit, see Article III rule 8.

"per package" compensation is subject to two exceptions. The vessel will be fully discharged from liability for any cargo loss or damage if the nature or value of the cargo has been knowingly misstated by the shipper in the bill of lading. Usually bills of lading stipulating a higher cargo valuation entail the payment of increased freight. A similar provision is found in Article 6 rule 4 of the Hamburg Rules.

(4). The distinction between common and private carriers is drawn by Dixon, J., in James v. The Commonwealth. He said:<sup>19</sup>

"The holding out or profession of the character of common carrier may be expressed, or it may be, and usually is, implied by a course of business or other conduct. It is in every case a question of fact whether the character of a common carrier has been assumed...If, instead of inviting all persons without discrimination to use his ships or vehicles, he reserves the right of choosing among them, independently of the suitability of their goods for his means of transportation and without regard to the room or space he has available, then he is not a common carrier."

Contracts of carriage governed by the Hague Rules are subject to an overriding consequence. In the event of an unjustified deviation, the carrier is relegated to the position of a common carrier and insurer. Apart from the common law exceptions, e.g. act of God, Queen's enemies and inherent vice in the goods, he cannot take advantage of the immunities under the Hague Rules.<sup>20</sup> This means that, in respect of the loss or damage sustained, he is not entitled to limit his liability under Article IV rule 5. The decision in Encyclopaedia Britannica Inc. v. The "Hong Kong Producer" and Universal Marine Corpn.<sup>21</sup> furnishes an illustration. The United States Court of Appeals held that an unauthorised stowage of containers on deck constituted an unjustified deviation. Consequently, the shipper was awarded the full amount of damages sustained.

In the High Court case of F. Kanematsu & Co. Ltd. v. The Ship "Shahzada"<sup>22</sup> the hides, shipped under two bills of lading subject to the

19. (1939) 62 C.L.R. 339, page 368.

20. It is questionable whether, in the light of the widely-worded provision in Article III rule 6 (i.e. "In any event...should have been delivered"), a carrier can rely on the one-year limitation period. As to justifiable deviations, see Article IV rule 4.

21. [1969] 2 Lloyd's Rep. 538.

22. (1956) 30-A.L.J. 478, where the High Court sat as a Colonial Court of Admiralty.

Sea-Carriage of Goods Act 1924 (Comth.) were carried on deck and damaged by water. It was not disputed that the unauthorised on-deck carriage constituted a deviation. In the admiralty action in rem, it was ably argued on behalf of the plaintiff cargo owner that -

"That breach...entitled it to rescind the contracts of carriage as from the time of the breach...and thereupon left the rights and liabilities of the parties to be determined as if the plaintiff's goods had been in the hands of the shipowner as a common carrier...."<sup>23</sup>

Taylor J.'s judgment shows that the principles which impose strict liability on common carriers is part of Australian law. However, the action was dismissed on the ground that the case fell outside section 6 of the Admiralty Court Act 1861 (Imp.).

It is submitted that a carrier's right to limit his liability is abrogated in a number of other situations. These include serious delay in performing the voyage,<sup>24</sup> voluntary departure from the contract route,<sup>25</sup> taking a ship on tow<sup>26</sup> and wrongfully delivering the goods carried to a person who cannot produce the proper documents of title.<sup>27</sup> The term "deviation" was considered by Windeyer, J. in Thomas National Transport (Melbourne) Pty. Ltd. v. May and Baker (Aust.) Pty. Ltd.<sup>28</sup> He held that it has come to mean departures not only from a carrier's geographical route, but also other radical breaches of his contract.

23. Ibid., p. 481.

24. Brandt v. Liverpool, Brazil and River Plate S.N. Co. [1924] 1 K.B. 575, at p. 601, per Aitkin, L.J.; p. 592, per Bankes, L.J.; Verren v. Anglo-Dutch Brick Co. (1924) 34 Ll. L.R. 210, p. 212, per Scrutton, L.J.

25. Rio Tinto Co. v. Seed Shipping Co. (1926) 24 Ll. L.R. 316.

26. Scaramanga v. Stamp (1880) 5 C.P.D. 295, p. 299, per Cockburn, C.J.

27. Kum and Another v. Wah Tat Bank Ltd. and Another [1971] 1 Lloyd's Rep. 439. The Privy Council held that delivery of goods in such circumstances amounted to a conversion by the shipowner. In Sze Hai Tong Bank v. Rambler Cycle Co. [1957] 3 All E.R. 182, the Privy Council held that delivery of goods to a person who failed to produce the bill of lading constituted a quasi-deviation.

28. 40 A.L.J.B. 189.



A recent decision of the Canadian Exchequer Court in Club Coffee Co. Ltd. v. Moore-McCormack Lines, Inc.,<sup>29</sup> if followed in Australia, will provide a new basis for increasing the liability of the ship or carrier beyond the limit imposed by Article IV rule 5. Under a bill of lading, purportedly subject to the Carriage of Goods Act 1936 (U.S.), the plaintiff had on board the Mormacisle 250 bags of coffee for delivery at Montreal. The plaintiff was obliged under the Canadian customs legislation to pay duty on the goods shipped into Canada even though they were not delivered. They were short delivered to the extent of ninety-two bags. Thurlow, J., gave judgement for the plaintiff against the carriers for the cost of non-delivered goods, insurance and freight, as well as the customs duty paid thereon.<sup>30</sup>

Although in cases of unjustified deviation or quasi-deviation the ship may be liable for loss or damage beyond the "per package" or "per unit" amount, the shipowner or the carrier may limit his liability under the Navigation Act 1912-73 (Comth.). Section 10 (1) of the Sea-Carriage of Goods Act 1924-1973 reads:

"Nothing in this Act shall affect...the operation of any other Act for the time being in force limiting the liability of the owner of sea-going vessels."

We shall, in due course, look at the circumstances where as a result of actual fault or privity on the part of shipowners or charterers, which caused the loss or damage, the statutory protection under the Navigation Amendment Act 1979 (Comth.) is unavailable. It is not entirely clear as to when a deviation will be held to constitute actual fault or privity. This issue is particularly important where an action in rem is instituted against the ship.

29. [1968] 2 Lloyd's Rep. 103. In The "City of Colombo" [1978] 2 Lloyd's Rep. 587, the plaintiff bill of lading holder paid customs duty on fifty bales of merchandise, of which only sixteen were delivered. He obtained judgment against the defendant carriers in respect of the customs duty paid on the missing bales. The decision of the trial court was unanimously upheld by the Canadian Federal Court of Appeal.

30. It is relevant to mention that under the "Gold Clause Agreement" (British Maritime Association Agreement of 1st August, 1950) shipowners' liability was limited to £200 (sterling) per package or unit. As a result of the amendment made on 1st July, 1977, the amount has been raised to £400 (sterling) per package or unit. But it is inapplicable to any bill of lading contract subject to the Brussels Protocol 1968.

### III. POLLUTION OF WATERS BY OIL

It will be recalled that strict liability is imposed by State and Commonwealth legislation on shipowners and, in some cases, on ships' masters for pollution by oil. Except where the statutory immunities are successfully invoked, few shipowners and masters have the financial capacity of coping with the consequences of a major oil spill. The International Convention on Civil Liability for Oil Pollution Damage 1969, which imposes no-fault liability, is the first Convention to limit the liability of owners of oil-carrying ships. From the comparative viewpoint, the Merchant Shipping (Oil Pollution) Act 1971 (U.K.) has incorporated into the law of the United Kingdom many provisions of the 1969 Convention. It was not until the years 1972 to 1973 that the State Parliaments of New South Wales, Queensland, South Australia and Victoria gave effect to the kernel provisions of the Convention.<sup>31</sup> It was only on 5th February, 1984,<sup>32</sup> that the Protection of the Sea (Civil Liability) Act 1981 (Comth.), to which the Convention is scheduled, came into operation. In Tasmania and Western Australia, the anomaly remains that there is no State legislation to limit the liability of shipowners for pollution damage. It appears that the difficulty is removed by section 7 (1) of the 1981 Act (Comth.). Part II will apply to trading ships proceeding on any inter-State voyage or Australian fishing vessels proceeding on a non-overseas voyage.<sup>33</sup> The reason is that in these two States Part II is operative to the extent that State law has not given effect to the applied provisions of the 1969 Convention.

#### 1. State Enactments

The Prevention of Oil Pollution of Navigable Waters Act 1960 (N.S.W.), as amended,<sup>34</sup> applies to the waters within the jurisdiction, any part of the coast and any reef of New South Wales. It confers protection by limiting the liability of the tanker where the discharge

31. See Chapter Five.

32. Proclamation in Commonwealth of Australia Gazette No. S. 31, 1st February, 1984.

33. See s. 7 (4).

34. By Prevention of Oil Pollution of Navigable Waters (Amendment) Act 1973 (N.S.W.).

of oil or mixture containing oil did not occur as a result of the actual fault or privity of the owner.<sup>35</sup> In terms of the expenses or other liabilities incurred by the Maritime Services Board in preventing, reducing or removing pollution damage, the maximum liability of a tanker is limited. Under section 7E (5), the maximum amount recoverable in respect of a single incident is either \$12,600,000 or calculated by multiplying \$120 by the tanker's tonnage factor.

The liability limit also applies to a person's claim where property loss or damage is caused by a similar discharge from a ship, including expenses incurred to prevent or mitigate the loss or damage.<sup>36</sup> This benefit avails even though the discharge is the result of the actual fault or privity of the shipowners or has come from two or more ships.<sup>37</sup> Unlike the Maritime Services Board,<sup>38</sup> a person seeking to recover compensation and the expenses incurred is not entitled to a charge on, and detain, the ship or ships.

In most respects, the Pollution of Waters by Oil Act 1973 (Qld.) corresponds to its New South Wales counterpart. But there are a number of important differences. By section 25, expenses or liabilities incurred by the Crown or any person in preventing or mitigating the consequences of a discharge from a tanker and the loss or damage sustained are recoverable. The limitation of liability has no application unless the expenses of preventive measures taken and/or the loss or damage sustained have resulted from an incident which occurred without the actual fault or privity of the owner. On proof of absence of actual fault or privity, the master of a tanker, when sued, is also entitled to the protection.<sup>39</sup> The words "for the purposes of any action apart from this Act" in section 30, which limit the liability in relation to a tanker or ship, seem to extend to pollution-damage claims based on maritime and common law principles.

35. Ibid., s. 7E (3).

36. Ibid., s. 8A (1).

37. Ibid., s. 8A (3).

38. For Board's statutory powers, see s. 7E (3).

39. 1973 Act, ss. 24 (3) and 30 (1).

Section 27 of the Navigable Waters (Oil Pollution) Act (Vic.),<sup>40</sup> applies only to the escape of oil from a ship carrying oil in bulk as cargo. The owners are liable for (i) any expenses or liabilities incurred by the Minister in taking preventive measures,<sup>41</sup> (ii) damage caused to the environment or a State resource by reason of contamination, and (iii) any loss or damage due to contamination suffered by a person. It is inadequate in that no provision is made to authorise private property owners to take preventive measures and to recover the costs incurred. In the absence of actual fault or privity of the shipowners,<sup>42</sup> the maximum amount recoverable in respect of a single incident is the same as in the other two States.

The South Australian legislation<sup>43</sup> follows a different philosophy with regard to the limitation of liability. Section 7d (3) provides for the same liability limit. It will only apply in respect of costs or expenses incurred by the Minister where the discharge of oil from a ship carrying oil in bulk as cargo was "wholly caused by the negligence of some other person."

## 2. Commonwealth Legislation

We shall look at the limitation of liability under the Protection of the Sea (Civil Liability) Act 1981 (Comth.). Section 8 (1) specifies those provisions of the 1969 Convention which have the force of law as part of the Commonwealth law. Although paragraph 1 of Article I of the 1969 Convention confines its application to ships actually "carrying oil in bulk as cargo", Part II of the Act has a wide scope. Subject to section 7 (1), Part II does not apply to a trading ship proceeding on an intra-State voyage and an Australian fishing vessel proceeding on a non-overseas voyage. Apart from certain exceptions, the Act is applicable to all ships, whether Australian or foreign. Express provisions are made to cover an escape or discharge

40. No. 6705 of 1960, as amended by Navigable Waters (Oil Pollution) (Amendment) Act (Vic.) of 1972 and 1975.

41. Unless the preventive measures are taken or expenses incurred by the "appropriate authority" defined in s. 4 (1), or by the Minister or on his orders, there is no right of recourse or recovery under the Victorian Act 1960.

42. Act 1960 (Vic.), s. 27 (3) and (5).

43. Prevention of Pollution of Waters by Oil Act 1961-1975 (S.A.), as amended by Prevention of Pollution of Waters by Oil Act Amendment Act (S.A.) (No. 24 of 1979).

of oil involving two or more oil-carrying ships where one or more of them are on an intra-State voyage and the other ship or ships are on an inter-State or overseas voyage.<sup>44</sup> By Article IV of the 1969 Convention, where pollution damage is caused, unless exonerated under Article III, the owners of the ships involved will be jointly and severally liable for all the damage that is not reasonably separable.

Paragraph 6 of Article I gives the term "pollution damage" a broad meaning. It means loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, including the costs of preventive measures and further loss or damage caused by preventive measures. The issue as to whether the escape or discharge was the result of the "actual fault or privity" of the shipowner is crucial.<sup>45</sup> Where the incident occurred without his actual fault or privity, he is entitled to limit his liability in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship's tonnage. The maximum amount recoverable does not exceed 210 million francs.<sup>46</sup> The statutory protection is conditional upon the shipowner depositing with the court of a Contracting State, where the action is brought, an adequate limitation fund or a bank guarantee acceptable to the court.<sup>47</sup>

It will be recalled that wide-ranging discretionary powers are vested in the Minister by the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.). He may take measures (i) under the 1969 Convention to prevent pollution of the sea by oil,<sup>48</sup> and (ii) otherwise than under the 1969 Convention or the Protocol to prevent similar pollution by oil.<sup>49</sup> Under Part IV of the Protection of the Sea (Civil Liability) Act 1981 (Comth.), where expenses or other liabilities are

44. See Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 7 (2).

45. The question as to who has the burden of proof will be considered shortly.

46. As to the conversion of francs into national currency, see infra.

47. Schedule I, Article V rule 2. See also A.H.E. Popp, "Liability and Compensation for Pollution Damage caused by Ships Revisited - Report on an International Conference" [1985] 1 L. M.C.L.Q. 118.

48. See s. 8.

49. See s. 10.

incurred in exercising the powers given, they constitute a debt due to the Commonwealth by the owner of the ship involved.

In respect of expenses or other liabilities incurred in relation to two or more ships, the owners of the ships are jointly and severally liable.<sup>50</sup> The Act does not apportion liability according to the quantity of oil discharged from each of the ships, even where the pollutants are reasonably separable. It is grossly unjust to hold a shipowner solely liable for all expenses incurred in the preventive measures taken on the ground that a small part of the oil happened to have come from his ship.

An observation should be made by reference to the International Convention for the Unification of Certain Rules with respect to Collision 1910. This deals with the division of loss according to the degree of fault. The provisions of the Convention, to which effect has been given by the Navigation Act 1912-73 (Comth.)<sup>51</sup> and the legislation of three States,<sup>52</sup> only apply to loss or damage resulting from collision and not from oil pollution. Consequently, under Part IV of the 1981 Act (Comth.) a shipowner can be compelled to pay in full the expenses or liabilities incurred in taking the preventive measures. In respect of any amount paid in excess, it appears that he is not entitled under the Commonwealth or State legislation to recover any contribution from the other shipowner, who was also at fault. There seems to be a gap in the 1981 Act (Comth.) which should be rectified.

In respect of the expenses or liabilities incurred by the Minister under the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.), the shipowner is protected. By section 20 (3) of the Protection of the Sea (Civil Liability) Act 1981 (Comth.), in the absence of actual fault or privity on the part of the shipowner, his liability in respect of an incident is limited. It is equal to (i) the product of the value of 133 special drawing rights and the tonnage factor applicable to the ship; or (ii) the value of fourteen million special drawing

50. Protection of the Sea (Civil Liability) Act 1981 (Comth.), Schedule I, Article IV.

51. Navigation Act 1912-73 (Comth.), ss. 259-263 and s. 396.

52. Namely, Victoria (Supreme Court Act 1958, s. 64), Western Australia (Supreme Court Act 1935-1979, s. 26) and South Australia (Supreme Court Act 1935-1975, s. 111).

rights, whichever is the lesser.<sup>53</sup> The special drawing rights are defined by reference to the meaning of the term as used in section 3 (1) of the International Monetary Agreements Act 1947-73 (Comth.).

### 3. Non-delegable Obligations

Anti-pollution legislation passed by State and Commonwealth Parliaments has adopted the maritime law concept of "actual fault or privity" to distinguish between two types of consequences.<sup>54</sup> The legislative policy is that, while a shipowner cannot be held wholly responsible for the acts or negligence of his employees, he is bound to make full compensation for any loss or damage due to his actual default or neglect. The use of this concept indicates the Parliaments' intention to impose certain duties on shipowners in their personal capacity. In Asiatic Petroleum Company Ltd. v. Lennard's Carrying Company Ltd., Buckley, L.J., referred to the nature and breach of such duties as follows:<sup>55</sup>

"The words 'actual fault or privity' in my judgment infer something personal to the owner, something blameworthy in him...If the owner be guilty of an act of omission to do something which he ought to have done, he is no less guilty of an 'actual fault' than if the act had been one of commission...It is not necessary to show knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them his omission so to do may be a fault, and, if so, it is an actual fault and he cannot claim the protection of the section."

It is submitted that the circumstances in which the duties arise are closely related to the meaning of "incident". One shortcoming of the anti-pollution legislation is the absence of a provision

53. See Protection of the Sea (Civil Liability) Regulations 1983, para. 11. As to the advantages of this method of converting francs into Australian dollars, see "Monetary Aspects", infra.

54. However, in the absence of an authoritative decision it is uncertain whether the pollution damage claimant has the onus of proof. The reason is that a shipowner's right to limit liability in Schedule I, Article V rule I is not expressed to be subject to proof of absence of actual fault or privity. If the claimant has to discharge the burden of proof, it will place on him a virtually impossible task. Knowledge of how a marine casualty occurs is generally confined to the shipowner. The decision in The "Amoco Cadiz" [1984] 2 Lloyd's Rep. 304, which concerns pollution damage in French territorial waters, is not helpful. As the case was heard in the United States, which at the material time had not adopted the International Convention on Civil Liability for Oil Pollution 1969, the issue as to the burden of proof considered was not relevant.

55. [1914] 1 K.B. 419, p. 432 (English Court of Appeal).

which gives a comprehensive definition of this key word. It is unclear whether, for the limitation of liability to apply, the incident which results in the discharge must fall within the navigation or management of the ship, or can come within any part of the ship's operations. The incident may occur during berthing, pilotage, transshipment, loading or discharge of goods.

The narrow view that a shipowner can only limit his liability where the incident is related to the ship's navigation or management affords wider protection to marine environment and the interests of third parties.<sup>56</sup> One grave economic disadvantage is that the unreasonably harsh responsibility and the risk of unlimited liability thrust upon a shipowner will have to be covered by third-party liability insurance. The expensive premiums payable will be passed on to shippers, consignees and oil consumers.

There are a number of reasons why a broad view is preferred and should be the correct approach. State anti-pollution enactments prevent the discharge of oil and mixtures containing oil by making it obligatory for every intra-State ship to be fitted with certain equipment and to comply with the requirements prescribed.<sup>57</sup> The extensive obligations imposed by Commonwealth legislation to prevent pollution by oil are of two types. First, there are specific requirements to be met under the Protection of the Sea (Prevention of Pollution from Ships) Act (Comth.).<sup>58</sup> They include the special surveys for oil tankers and ships in excess of certain gross tonnage, provision of oil discharge monitoring and control system, installation of oily-water separating equipment, and the pumping, piping and discharge arrangements as provided.<sup>59</sup> Second, following upon a maritime casualty or acts related thereto, as part of the measure to prevent or reduce the danger, the Minister may issue directions to the owner or master of the ship concerned. The directions may render it obligatory for some act or thing to be done in relation to the ship or her

56. Cf. Protection of the Sea (Civil Liability) Act 1981 (Comth.), Schedule 1, Article V.

57. See e.g. Prevention of Pollution of Waters by Oil Act 1961 (S.A.), ss. 8 and 9; Prevention of Oil Pollution of Navigable Waters Act 1960 (N.S.W.), ss. 8 and 9; Prevention of Pollution of Waters by Oil Act 1960 (W.A.), ss. 8 and 9; Navigable Waters (Oil Pollution) Act 1960 (Vic.), ss. 9 and 10; Pollution of Waters by Oil Act 1973 (Qld.), ss. 32 and 33.

58. No. 41 of 1983.

59. Schedule 1 (Annex 1) chapter 1, regulation 4, chapter 2 regulations 16 and 18, etc.



cargo, or prohibit the doing of any such act or thing.<sup>60</sup> It is submitted that such requirements, both in terms of technical equipments and directions to be complied with, are imposed by legislation on the shipowner in his personal capacity. If the reasoning is correct, it means that the new obligations are in addition to those duties which have long been recognised by maritime law as personal to the shipowner. In determining the issue as to a shipowner's actual fault or privity under State and Commonwealth legislation, regard should be given to the question whether the incident has resulted from a breach of any of those maritime law duties and mandatory requirements.

Part IV of the Protection of the Sea (Civil Liability) Act 1981 (Comth.) is largely concerned with the recovery against the shipowner of expenses or other liabilities incurred by the Minister in taking preventive measures. Take the case of an oil tanker involved in a maritime casualty where the incident does not come within any of the exceptions in section 20 (2), and where pollution damage is bound to eventuate. Suppose the ministerial directions<sup>61</sup> issued to the shipowner or master are disregarded and widespread pollution damage occurs. It appears that under section 20 (3), the shipowner would be unable to limit his liability. This disentitlement - it is submitted - should not prevent him from taking advantage of other provisions, if applicable, which limit his liability. The provisions in Part II of the Protection of the Sea (Civil Liability) Act 1981 (Comth.) and, where the pollution damage is actionable at common law, the provisions of Part VIII of the Navigation Act 1912-73 (Comth.)<sup>62</sup> may be applicable.<sup>63</sup>

There may be situations where a non-oil carrying ship can benefit from the limitation of liability. Suppose that, as a result of a collision for which a tanker and a ship are equally to blame, oil escapes from the former. Under the Protection of the Sea (Civil

60. Protection of the Sea (Powers of Intervention) Act 1981 (Comth.), ss. 8, 9 and 10.

61. Ibid., s. 11.

62. Ibid., 20 (6) provides that s. 20 will not "affect the operation of Part VIII of the Navigation Act 1912 (Comth.)", which is deemed to include the amendments.

63. For position in the United Kingdom, see infra.

Liability) Act 1981, the tanker owner will be answerable for the entire pollution damage. Where the incident occurs without the owner's actual fault or privity, he is entitled to limit his liability under paragraphs 1 and 2 of Article V of the 1969 Convention. The tanker owner's right of recourse,<sup>64</sup> whether exercised in an action in rem against the ship or in personam against the shipowner, should extend to recovering half the amount paid under the 1981 (Comth.).

It appears that the amount payable in contribution may be further reduced if the ship is of low tonnage and her owner is able to limit his liability under Part VIII of the Navigation Act 1912-73 (Comth.).

The wording of Article 1 (b) of the 1957 Convention, given the force of law in Part VIII, appears wide enough to cover pollution damage which is actionable at common law. It is doubtful whether, under maritime law, the expenses of preventive measures and clean-up costs incurred by third parties can be recovered against the wrongdoing ship. Another issue is whether such expenses and costs, which may be very substantial, if recoverable, are subject to the limitation of liability as provided by Article 1 (b). Legislation is urgently needed to clarify the position.

On the other hand, the United Kingdom Parliament has adopted a realistic approach. Section 15 of the Merchant Shipping (Oil Pollution) Act 1971 (U.K.) has closed a gap in the law. It applies where the pollution damage caused and the measures taken are not within section 1, i.e. not covered by the International Convention on Civil Liability for Oil Pollution Damage 1969.<sup>65</sup> The costs of measures "reasonably taken" for the purpose of preventing or reducing pollution damage in the United Kingdom are recoverable. The statutory indemnity provided is fairly wide. It extends to the costs of such measures

64. Article III para. 5.

65. Its provisions are given the force of law in the United Kingdom by Merchant Shipping (Oil Pollution) Act 1971 (U.K.). As to changes in the law on limitation of liability, see Marsden, The Law of Collisions at Sea (3rd ed. Cum. Supp. to 11th ed. 1973), para. 204. For claims in respect of liability incurred under Merchant Shipping Act 1971 (U.K.), s. 1, which are excluded, see Merchant Shipping Act 1979 (U.K.), Schedule 4, Part II para. 4 (1).

taken by a person not only for the protection of his interests but also in the performance of a duty.<sup>66</sup>

Another uncertainty has been removed. Section 15 (2) provided that the liabilities or costs incurred would be deemed to be damages in respect of such loss, damage or infringement as was within the meaning of section 503 (1) (d) of the Merchant Shipping Act 1894 (Imp.). Section 15 (2) has been amended by paragraph 6 (2) of Schedule 5 to the Merchant Shipping Act 1979 (U.K.). The liabilities or costs incurred are deemed to be claims within Article 2 (1) (a) of Part I of Schedule 4 to the 1979 Act (U.K.).

Further differences between the laws of the two countries, as a result of the passing of the Merchant Shipping Act 1979 (U.K.), will be considered in due course.

#### IV. IMPERIAL LEGISLATION TILL 1900

Common law and the "general law maritime" conferred on ship-owners no limitation of liability for torts. In The Carl Johanar,<sup>67</sup> Lord Stowell said:

"Anciently, the [ship] owners were under the general law, civilly answerable for the total loss occasioned by the negligence or unskilfulness of the persons they employed."<sup>68</sup>

We have seen that, at common law, shipowners as common carriers were, apart from certain exceptions, subject to a strict liability in respect of any loss or damage sustained by the goods in their charge.

Although under the Joint Stock Companies Registration and Regulation Act 1844 (Imp.),<sup>69</sup> the corporate status could be attained by having the company's constitution registered, the members did not enjoy the benefit of limitation of liability until the Limited Liability Act 1855 (Imp.)<sup>70</sup> was passed. Even with the passing of the

66. Merchant Shipping (Oil Pollution) Act 1971 (U.K.), s. 15 (1).

67. Case of a British vessel run down by a Swedish vessel; decided on 20th November, 1821; 2 Hagg. Ad. Rep. 186; 3 Hagg. 186.

68. Cited with approval by Sir W. Page Wood, V.C. in Cope v. Doherty (1858) 70 E.R. 154, p. 158.

69. 7 & 8 Vic., cc. 110 and 111.

70. 18 & 19 Vic., c. 133.

Limited Partnership Act 1907 (Imp.),<sup>71</sup> only the dormant partners are protected. Before the Limited Liability Act 1855 (Imp.) and the Limited Partnership Act 1907 (U.K.) were enacted, Imperial legislation had provided for British ships to be registered in the names of the owners or part-owners.<sup>72</sup>

In this context, the reasons for statutory intervention are fairly obvious. It seems, however, that the concept of limiting the liability of shipowners was first adopted by the British Parliament from Holland and other maritime countries.<sup>73</sup> The preambles to the Responsibility of Shipowners Acts (Imp.)<sup>74</sup> highlighted the policy of encouraging British merchants to own ships so as to enlarge the British merchant fleet. The Acts also sought to remove from shipowners the haunting fears and risks of unlimited liability imposed by both common law and the general maritime law. Dr. Lushington probably had in mind the British Empire-building strategy when he said:<sup>75</sup>

"The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons."

The Responsibility of Shipowners Act 1734 (Imp.), the first in the series, came into force on 24th June of that year. Where any gold or precious stones or other goods carried were lost or damaged due to the embezzlement or making away with by any crew, shipowners were protected in certain circumstances under the Act. On proof by shipowners that the loss or damage occurred without their "privity and knowledge", they were not liable beyond the value of the ship with all her appurtenances and the full amount of the freight "due or to grow due for and during the voyage" concerned.<sup>76</sup>

71. 7 Edw., VII, c. 24. For Australian State legislation, see Mercantile Act (Qld.) (No. 36 of 1867); Limited Partnerships Act (Tas.) (No. 6 of 1908); Limited Partnership Act (W.A.) (No. 17 of 1909).

72. See Chapter Four.

73. The Dundee (1823) 166 E.R. 39, 44; Cope v. Doherty (1858) 70 E.R. 154, p. 158.

74. (1734) 7 Geo. II, c. 15; (1786) 26 Geo. III, c. 86; (1813) 53 Geo. III, c. 159.

75. The Amalia (1863) 8 L.T. (N.S.) 805, p. 807. On appeal to the Privy Council, the judgment of Dr. Lushington was affirmed: ibid., p. 810.

76. (1734) 7 Geo. II, c. 15, s. 1.

The 1734 Act (Imp.) had a narrow compass and only gave relief to shipowners where the loss or damage resulted from fraudulent acts or designs of the crew, over which the former had no physical control. It modified the liability arising under the doctrine of respondeat superior and the general maritime law. The 1786 Act (Imp.) extended the valuable protection of shipowners in two ways. Firstly, in the absence of privity and knowledge of the shipowners, it applied irrespective of whether the loss or damage due to embezzlement, making away with or robbery was committed by the crew or any stranger.<sup>77</sup> Secondly, section 3 imposed on the shipper of gold, silver, watches and precious stones certain conditions to be met at the time of shipment. Non-fulfilment of such requirements would totally exonerate the shipowners or master of the ship from any liability for the loss or damage. A number of significant changes to the statutory relief was made by the 1813 Act (Imp.). They were not all one-sided. In the absence of fault or privity of the shipowners, the limited liability would apply where loss or damage was caused to any goods or other thing carried by reason of any act, neglect or omission.<sup>78</sup> Shipowners were thus protected in respect of loss or damage due to a wider range of occurrences. In two situations, the interests of cargo owners were regarded as preponderant. The privilege of limiting liability was unavailable to the owners of any lighter, barge or vessel used solely in rivers or inland navigation, or of any ship not registered according to law.<sup>79</sup> Section 3 addressed the problems created where the loss or damage was caused by more than one separate and distinct act, neglect or omission, or on more than one occasion during the voyage, or after the end of any voyage, and before the commencement of another voyage. In respect of every such loss or damage, compensation was recoverable up to the same liability limit as if no other loss or damage had occurred on that voyage or at any other material time.

The right to limit liability only availed shipowners for loss of or damage to valuables, e.g. gold and precious stones, and ordinary goods carried on board. When maritime trade and transportation

77. 26 Geo. III, c. 86, s. 1.

78. 53 Geo. III, c. 159, s. 1.

79. Ibid., s. 5.

became recognised as an important source of wealth, the ports, navigable waterways and ocean lanes in many parts of the world were frequented by cargo, fishing and passenger vessels. Again prior to the enactment of the Limited Liability Act 1855 (Imp.) and the Limited Partnership Act 1907 (Imp.), shipowners had no protection against certain consequences arising from collisions at sea. They were subject to unlimited liability for personal injury or death negligently caused to crew members and other persons, including passengers, carried in ships. Consistent with its policy of promoting British ownership of merchant vessels on an Empire-wide basis, the British Parliament intervened. This led to extended protection being conferred under section 504 of the Merchant Shipping Act 1854 (Imp.). In the absence of actual fault or privity of the shipowners, they were not liable beyond the statutory limit where all or any of the following events occurred, viz.:

- "(1) Where any loss of life or personal injury is caused to any person being carried in such ship;
- (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;
- (3) Where loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;
- (4) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship."

In respect of every such loss of life, personal injury and/or loss of or damage to goods arising on each separate occasion, a plaintiff was entitled to recover up to the statutory limit.

Part IX of the Merchant Shipping Act 1854 (Imp.), which dealt with the limitation of liability of shipowners, was stated in section 502 to apply to the whole of Her Majesty's Dominions. Certain gaps in section 504 were brought to light. In considering the application of the Act (Imp.) to foreign ships, Dr. Lushington had said:<sup>80</sup>

"The power of this country is to legislate for its own subjects all over the world; and as to foreigners within its jurisdiction, and no more."

80. The Zokverein (1856) 2 Jur. (N.S.) 429, p. 429.

A similar issue was raised in Cope v. Doherty. Sir Page Wood, V-C, adopted Dr. Lushington's proposition and refused to extend the benefit of section 504 to American shipowners. He said:<sup>81</sup>

"Prima facie, therefore, it would not be the true construction of the clause presented for my consideration that it is applicable to foreign ships on the high seas — matters themselves entirely beyond the jurisdiction and scope of the Legislature of this country."

Section 504 would apply to collisions between British ships on the high seas,<sup>82</sup> and also between British ships and foreign ships within British jurisdiction, i.e. within three miles of the coast of Her Majesty's Dominions.<sup>83</sup> But it fell short of protecting British shipowners where loss or damage was negligently caused by their ships anywhere outside the three-mile jurisdiction to a foreign ship, including any person or goods carried thereon. The reason was that, without express words to that effect, Imperial statutes were not to be construed as depriving foreign shipowners of their full natural rights against British or other shipowners.

By parity of reasoning, the section would not avail a foreign shipowner. This was demonstrated in the case of The "Wild Ranger".<sup>84</sup> Due to improper navigation, an American vessel collided with a British vessel on the high seas. The American shipowners sought to limit their liability under the British legislation. They based their argument on the doctrine of reciprocity in that under American law relating to collision British shipowners, if placed in similar circumstances, were entitled to the benefit of limited liability. Dr. Lushington refused to grant the declaration on the ground that the British Act did not apply to owners of foreign vessels on the high seas.

There was probably another unsatisfactory aspect. It has been observed that Imperial legislation, which provided the benefit of limiting liability, was aimed at increasing the tonnage of British

81. (1858) 70 E.R. 154, p. 157.

82. Gale v. Laurie and Others (1826) 108 E.R. 58.

83. General Iron Screw Collier Co. v. Schurmanns (1860) 70 E.R. 712, p. 717, per Sir W.P. Wood, V.C. He gave as a basis of the proposition the advancement of British shipping and encouragement of commerce.

84. 7 L.T. Rep. (N.S.) 725.

merchant fleet. This statutory protection was clearly not intended to extend to foreign shipowners. It admitted of no exception even though the collision damage negligently caused by a foreign ship occurred, and the suit was also brought, in Her Majesty's Dominions.<sup>85</sup>

Two of the glaring defects in the legislation brought to light were its inapplicability to collisions between British and foreign ships occurring outside Her Majesty's territorial jurisdiction, and the lack of reciprocity. A change in Imperial policy was made for the purpose of dealing with these problems. Section 54 of the Merchant Shipping Act Amendment Act (Imp.) 1862, for the first time extended to the "owners of any ship, whether British or Foreign," the privilege of limiting liability conferred by section 504 of the 1854 Act (Imp.). Its historic implications are twofold. There was assumption by the British Parliament of legislative competence beyond Her Majesty's Dominions. Owners of foreign ships, which had negligently run into, or caused damage to, British or other foreign ships in international waters, would resort to the English Court of Admiralty to obtain statutory protection. Britain was, therefore, able to capture a large share of the profitable litigation work in maritime matters.

An important landmark in furthering British policy is the Privy Council decision in The Amalia.<sup>86</sup> In May 1863, a collision occurred in the Mediterranean Sea "out of British territorial jurisdiction," between the British steamship Amalia and the Belgian steamship Maria de Brabant. The latter and her cargo were sunk and some persons on board were drowned. All those affected, namely, the shipowners, cargo-owners and victims including the master and crew, were citizens of Belgium. Dr. Lushington granted a declaration sought by the British shipowners that they were, by reason of section 54 of the 1862 Act (Imp.), entitled to limit their liability to the statutory maximum. The High Court of Admiralty decision was affirmed. Lord Chelmsford, who delivered the Privy Council judgment, pointed out that "the intention of the Legislature, so far as can be collected, from the language employed, seems to be to place British and foreign ships on the same footing."<sup>87</sup> The decision embodied a political element in that national interests in

85. Imperial legislation was clearly based against foreign ships.

86. (1863) 8 L.T. (N.S.) 805.

87. Ibid., p. 809; see also p. 810.



shipping matters were allowed to supersede the rule of international law and interfere with the rights of foreigners with regard to the quantum of damages recoverable.

The Merchant Shipping Act 1854 (Imp.) was repealed, and section 504, as amended by the 1862 Act (Imp.), was consolidated in section 503 of the 1894 Act (Imp.).<sup>88</sup> Succeeding amendments had continued the expansionist policy of encouraging British subjects to own ships and of promoting shipbuilding industries in the British Empire. The limitation of liability under sections 502 to 509 of the 1894 Act (Imp.) had been extended to the owners and builders of, including other persons interested in, any ship built in any part of Her Majesty's Dominions. Subject to the maximum duration of three months after the launching, the protection became operative from, and including, the launching of such ship until her registration under the Act (Imp.).<sup>89</sup> It covered claims for loss of life, personal injury and damage.

Before the end of the twentieth century, a number of serious shortcomings became apparent. The limitation of liability only applied where, as a result of improper navigation, death or injury was caused to people on board a vessel, or where loss or damage was caused to goods or property on board a vessel, or to another vessel as such. It did not apply where such death, injury or damage arose not from improper navigation but from negligent management of the ship. Nor would it avail where, without the actual fault or privity of the owners, the ship negligently ran into and damaged a wharf, an oil rig, a bridge or any floating object not being a ship. The gaps in the protection were closed by section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (Imp.).<sup>90</sup> This was an unprecedented extension of the limitation of liability of shipowners under section 503 of the 1894 Act (Imp.) to cover loss or damage caused to floating objects, goods or other things. It applied where, without the actual fault or privity

88. Ss. 502-509 in Part VIII replaced by Convention on Limitation of Liability for Maritime Claims 1976. See Merchant Shipping Act 1979 (U.K.) (c. 39), s. 17 and Schedule 7 Part I.

89. Merchant Shipping Act 1898 (61 & 62 Vic., c. 14), s. 1.

90. 63 & 64 Vic., c. 32, s. 2 (2) and (3); repealed by Merchant Shipping Act 1979 (U.K.), Schedule 7 Part I.

of shipowners and by reason of improper navigation or management of the ship, loss or damage was caused to property of any kind, whether on land or in water, or whether fixed or movable.

The crucial question concerns the applicability to the Australian colonies of the above British legislation limiting the liability of shipowners. By section 1 of the Colonial Laws Validity Act 1865,<sup>91</sup> an Imperial Act or any provision thereof shall extend to any colony when it is made applicable thereto by express words or the necessary intendment. It has been generally assumed that the Responsibility of Shipowners Acts (Imp.), 1734, 1786 and 1813, passed prior to the Australian Courts Act 1828 (Imp.), operated as part of the laws of Australia. Part IX of the Merchant Shipping Act 1854 (Imp.), which provided for the limitation of liability of shipowners, was expressed to apply to "the whole of Her Majesty's Dominions." The expression embraces the Australian colonies. The "limitation of liability" provisions were re-enacted in Part VIII of the Merchant Shipping Act 1894 (Imp.). Before its repeal, section 509 had provided that, subject to contrary provisions in the text, this Part was to "extend to the whole of Her Majesty's Dominions." In fact, the opening words of section 503 ("The owners of a ship, British or foreign") and section 504 ("Where any liability is...incurred by the owner of a British or foreign ship") showed the necessary intendment of the British Parliament for the purpose.

One aspect of the question is whether the wider relief conferred by section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (Imp.) would apply to Australia, where the property damaged belonged to the Crown. Several matters relating to the question arose in China Ocean Shipping Co. and Others v. State of South Australia.<sup>92</sup> The case stated was removed from the Supreme Court of South Australia to the High Court of Australia. A ship had damaged a port installation in South Australia and was sued by a Minister of the Crown in right of the State under the Harbours Act 1936 (S.A.). One of the plaintiffs, as shipowner, sought relief under section 504 of the Merchant Shipping Act 1894-1900 (Imp.) so as to limit his liability under section 503. Barwick, C.J., Gibbs, Stephen and Aickin, J.J., held that the provisions of sections 503 and 504 of the 1894 Act (Imp.),

91. 28 & 29 Vic., c. 63.

92. (1979-80) 27 A.L.R. 1.

as extended by section 1 of the 1900 Act (Imp.), applied in South Australia at the time of the collision. Barwick, C.J., made it clear that "the 1900 Act was effective to include in the operation of s. 503 of the 1894 Act damage done to port and shore installations."<sup>93</sup> Although the 1900 Act (Imp.) contained no provision corresponding to section 509 of the 1894 Act (Imp.) as regards its application, the Court gave effect to section 5 which required the former to be construed as one with the 1894 Act.

Another issue raised was whether sections 503 and 504 would operate to curtail the rights of the Crown to full compensation where its property was damaged by collision. The rule is that the Crown is not bound by a statute, unless expressly named therein or unless it is bound by necessary implication.<sup>94</sup> Gibbs, Stephen and Aickin, J.J., were of the view that the 1894 and 1900 Acts (Imp.) did not of their own force bind the Crown in right of the State of South Australia either expressly or by necessary implication. In his dissenting judgment, Barwick C.J., said:<sup>95</sup>

"I can think of no policy reason why an owner should be exposed to unlimited liability to the Crown as well as limited liability to those interests which may be involved in the collision...the words of s. 503 are so universal in character; and there is no difficulty in including the Crown within the description of 'person' in a statute."

His construction is more in line with the policy of the Navigation Act 1912-73 (Comth.). By section 2A, the Act is expressed to "bind the Crown in right of the Commonwealth, of each of the States and of the Northern Territory."<sup>96</sup> Section 65 (1) of the Navigation Amendment Act 1979 (Comth.) has substituted a new Part VIII on the limitation and exclusion of shipowners' liability for the old Part VIII of the Navigation Act 1912-73 (Comth.). The Crown is, therefore, bound by the provisions of Part VIII.

93. *Ibid.*, p. 8.

94. Interpretation Act 1889 (U.K.) (52 & 53 Vic., c. 63), s. 30; see also Crown Proceedings Act 1947 (U.K.) (10 & 11 Geo. VI, c. 44), ss. 31 (1) and 40 (2) (f).

95. (1979-80) 27 A.L.R., pp. 13-14.

96. As amended by Navigation Amendment Act 1980 (Comth.), s. 4.

## V. DEVELOPMENTS AFTER 1900

### 1. Imperial Legislation

Murphy J.'s dissenting judgment was obviously incorrect. He held that the Merchant Shipping Act 1894 (Imp.) had ceased to operate in Australia when the Commonwealth was formed on 1st January, 1901 or on the ground that the Navigation Act 1912 (Comth.) had put an end to its operation.<sup>97</sup> Barwick, C.J., highlighted the paramountcy of the 1894 Act based on the Colonial Laws Validity Act 1865 (Imp.), when he said:<sup>98</sup>

"The historical, political and legal reality is that from 1901 until some period of time subsequent to the passage and adoption of the Statute of Westminster [1931], the Commonwealth was no more than a self-governing colony though latterly having a dominion status."

Before the Statute of Westminster Adoption Act 1942 (Comth.) was passed, the powers of the Imperial Parliament to legislate for the colonies were expressly reserved in the Colonial Laws Validity Act 1865 (Imp.). Indeed such powers had been frequently exercised to deal with defects in the law which would otherwise undermine Britain's plan to expand her merchant fleet and shipbuilding industries.

In the case of The Hopper No. 66,<sup>99</sup> a ship while under a demise charter was involved in a collision. Bargrave, J., who tried the action, held that the charterers were not owners of the ship within sections 503 and 504 of the 1894 Act (Imp.). On appeal to the House of Lords, the decision of the trial court and that of the Court of Appeal were unanimously reversed.<sup>1</sup> All their Lordships were of the view that the word "owners" in the two sections should be given a broader interpretation which it bore in other parts of the Act. Lord Lordburn, L.C., ably pointed out the twofold mischief which section 503 was intended to provide against. His concern for charterers by demise was expressed as follows:<sup>2</sup>

"And we must...conclude that the policy of the present section was simply to prevent ruinous damages from being

97. China Ocean Shipping Co. and Others v. State of South Australia (1979-80) 27 A.L.R. 1, pp. 48 and 53.

98. Ibid., p. 8.

99. Sir John Jackson Limited v. Owners of the Steamship "Blanche", Her Master and Crew, and Others [1908] A.C. 126.

1. [1906] P. 34 and [1907] P. 254 (C.A.).

2. [1908] A.C. 126, p. 131.

inflicted upon an innocent principal as the consequence of an error of judgment in a difficult and dangerous business by his agents in charge of a vessel. I can perceive no reason why the present appellants should be subject to unlimited liability that does not equally apply to the registered owner. I cannot doubt that if charterers by demise are to be so subject there will be an end of such charters...."

Following the undesirable decision by Bargrave Dean, J.<sup>3</sup> the Merchant Shipping Act 1906 (Imp.), which applied to the whole of Her Majesty's Dominions, was passed<sup>4</sup> to remove the difficulty. By section 71 of the Act, sections 502 to 509 of the 1894 Act (Imp.)<sup>5</sup> were to be "read so that the word 'owner' shall be deemed to include any charterer to whom the ship is demised."

The word "owner" was given an even wider meaning by the High Court of Australia in McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd.<sup>6</sup> Damage was caused to the collier Hetton Bank as a result of the improper navigation of the tug Bonnie Bell and the lighter lashed to it. The Full Court of the Supreme Court of New South Wales held that Shell Co. Ltd. was entitled to limit its liability according to the combined tonnage of the two craft. The owners of the Hetton Bank appealed against this decision. Shell Co. Ltd. had hired the lighter under a parol arrangement. It was contended that, since Shell Co. Ltd. was not a charterer by demise of the lighter, it was not entitled to limit its liability under section 503 of the 1894 Act (Imp.). The High Court of Australia took into account the reality of the hirer's position as presented by the facts, and adopted a broad construction. Dixon, J., said:<sup>7</sup>

"...I think it remains correct that in s. 503 of the Act of 1894, or more accurately, in relation to this case, s. 1 of the Act of 1898, "owner" includes a person who has immediate and exclusive possession of a ship either indefinitely or for a term and has responsibility of its control and management

3. On 21st December, 1905: [1906] P. 34. It was affirmed by the English Court of Appeal on 25th March, 1907: [1907] P. 254.
4. On 21st December, 1906 (6 Edw. VII, c. 48). The gap in the statutory protection was treated by the British Parliament as a matter of serious concern.
5. Repealed and replaced by s. 17 and Schedule 4 Part I, Merchant Shipping Act 1979 (U.K.).
6. (1945) 70 C.L.R. 175.
7. Ibid., p. 215.

by himself and his servants. In other words, it includes as well the special property as the general property in a ship."

It was further contended that, even if the lighter was a ship, Shell Co. Ltd. was not entitled to limit its liability on the ground that she was not registered. The weight of English authorities<sup>8</sup> and section 742 of the Merchant Shipping Act 1894 (Imp.) led their Honours to decide that the lighter was a ship. The relevant provisions relating to the issue were examined. By section 2, every British ship, unless exempted from registry, must be registered under the Act. If a ship is required to be registered and is not registered, "she shall not be recognised as a British ship." Section 1 of the Merchant Shipping (Liability of Shipowners) Act 1898 (Imp.) was amended by section 85 of the Merchant Shipping Act 1906 (Imp.). The effect was to extend the privilege of limitation of liability to the owners, builders and other parties interested in any ship built in any port or place in Her Majesty's Dominions "from and including the launching of such ship until the registration thereof under section 2 of the Merchant Shipping Act 1894." The proviso in section 1 of the 1898 Act (Imp.), which restricted the benefit of that provision to a period of three months from the launching of the ship, was repealed by section 85 of and the Second Schedule to the 1906 Act (Imp.). It was held that, as a result of the repeal, sections 502 to 509 of the 1894 Act (Imp.) enabled the owners, builders and parties interested in any ship built in Her Majesty's Dominions to claim limitation of liability once she was launched until she was registered. Dixon, J., took the view that "upon registration the 'parties interested', as distinguished from 'owners', lost their right to limit."<sup>9</sup> Obviously the "parties interested" would include the builder and mortgagees by bill of sale. The appeal was unanimously dismissed.

The legal and political significance of the decision is this. By

8. In The Harlow [1922] P. 175, the barges fitted with rudders and not propelled by oars were held to be ships within the meaning of the 1894 Act (Imp.), ss. 503 and 742. By reason of the 1898 Act (Imp.) s. 1 and the 1906 Act (Imp.), s. 85, Schedule II, they did not require registration; the plaintiffs were held to be entitled to a decree of limitation of liability. In The Champion [1934] P. 1, a barge not being propelled by oars was held to be a ship within the meaning of the Admiralty Court Act 1861 (Imp.), s. 2.

9. (1945) 70 C.L.R. 175, p. 213.

giving a wide meaning to the word "owner" and following the English approach, the High Court of Australia had in large measure contributed to consistency in the British shipping policy. Up to this stage of history, there had been harmony between Britain and Australia in the maritime legislation and the judicial attitude towards the defects brought to light.

In other respects, the protection in terms of limitation of liability was found to be inadequate. One of the problems was first foreshadowed in the case of Scruttons Ltd. v. Midland Silicones Ltd.<sup>10</sup> In 1957, while discharging goods from a ship, the stevedores negligently dropped a drum. The damage caused amounted to £593 12s. 2 d. The bill of lading was subject to the Carriage of Goods by Sea Act 1936 (U.S.), which limited the liability of the carriers for loss or damage to 500 dollars per package. It was held that the stevedores were excluded by the doctrine of privity of contract from taking advantage of the limitation of liability. In view of the serious situation which would arise if the decision was eventually affirmed on appeal to the House of Lords, legislative measures were necessary to remedy the anomaly. By reason of the decision, a claimant could avoid the effect of sections 503 and 504 of the 1894 Act (Imp.) by suing in negligence the master, crew or other servant directly responsible for the loss, damage or injury caused. Moreover, in China Ocean Shipping Co. and Others v. State of South Australia,<sup>11</sup> Barwick, C.J., Gibbs, Stephen and Aickin, J.J., had held that a ship's master was not entitled to limit his liability under section 503 and to bring proceedings under section 504 of the Act 1894-1900 (Imp.).

Another grave shortcoming was the absence of protection for shipowners and their servants in respect of injuries and deaths caused by improper navigation or negligent management of the ship to persons not carried therein.

The International Convention relating to the Limitation of Liability of Owners of Sea-going Ships 1957 was formulated to deal with the problems highlighted above. Although it was ratified or acceded to by the United Kingdom and thirty-two other countries, Australia was not included among them. By the Merchant Shipping (Liability of Shipowners

10. [1962] 1 All E.R. 1 (House of Lords).

11. (1979-80) 27 A.L.R. 1, p. 4.

and Others) Act 1958<sup>12</sup> the United Kingdom gave effect to it.

## 2. Commonwealth legislation

It is interesting to ascertain how closely Australia kept pace with developments in English maritime law after she attained full nationhood in 1942.<sup>13</sup> Two historic decisions of the High Court of Australia had given rise to important reforms in the law.

We shall briefly look at the background incidents that led to the first decision. Section 741 of the Merchant Shipping Act 1894 (Imp.) reads, "This Act shall not, except where specially provided, apply to ships belonging to Her Majesty". The Crown's liability in tort under English law was enacted for the first time by section 2 of the Crown Proceedings Act 1947 (U.K.). For the purpose of limiting Her Majesty's liability as regards Her Majesty's ships, section 5 has extended the protection of section 503 of the 1894-1940 Acts (Imp.).<sup>14</sup> However, in New South Wales, by reason of legislation passed by the colonial legislature,<sup>15</sup> the Crown was under a liability in tort. Soon after its formation, the Commonwealth was rendered suable in tort by the passing of the Claims Against the Commonwealth Act 1902 (Comth.). The provisions have been consolidated in sections 56 to 67 of the Judiciary Act 1903 (Comth.). Since the Merchant Shipping Act 1894 (Imp.), including section 741, operated throughout Her Majesty's Dominions, it was evident that, in Australia, the Crown would not be entitled to limit its liability in respect of Her Majesty's ships. To remedy the situation, section 80 of the Merchant Shipping Act 1906 (Imp.) was passed. It provided:

- (1) Her Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships, for the purpose of the Merchant Shipping Acts, and those Acts...shall apply to Government ships registered in accordance with those regulations as if they were registered in manner provided by those Acts."

12. 6 & 7 Eliz. II, c. 62. As to the extent of repeal, see Merchant Shipping Act 1979 (U.K.), Schedule 7 Part I. For position in Australia, see *infra*.

13. After the Statute of Westminster Adoption Act 1942 (Comth.) was passed.

14. Crown Proceedings Act 1947 (U.K.), s. 5, amended by Schedule 5 para. 3, Merchant Shipping Act 1979 (U.K.). The provisions of 17 and 18 and Schedule 4 of this Act apply in relation to Her Majesty's ships.

15. See New South Wales Act (39 Vic. No. 38); in Farnell v. Bowman (1889) 12 App. Cas. 643, the Privy Council affirmed the Supreme Court of New South Wales decision that the Government of the colony was liable in tort under the Act 39 Vic. No. 38.



On 8th December, 1924, an Order in Council<sup>16</sup> was made under section 80 for the registration of ships belonging to the Commonwealth Government. Under the Order, the provisions, which were excluded from applying to Government ships so registered, did not include those in Part VIII of the 1894 Act (Imp.).

In Asiatic Steam Navigation Co. Ltd. v. Commonwealth of Australia,<sup>17</sup> owing to improper navigation of the British ship River Loddon, though without actual fault or privity of the Commonwealth, damage by collision was caused to the ship Shahzada. The owners of the latter appealed to the High Court against the decision of Taylor, J. who held that the Commonwealth, as owner of the River Loddon, was entitled to limit its liability under section 503 of the 1894 Act (Imp.). According to Dixon, C.J., McTiernan and Williams, J.J., sections 75 (iii) and 78 of the Commonwealth Constitution and sections 56 and 64 of the Judiciary Act 1903-1955 (Comth.) were applicable to the case. They were held to have the consequence of imposing upon "the Commonwealth a substantive liability in tort ascertained as nearly as may be by the same rules of law as should apply between subject and subject." The effect was to extend the operation of section 503 as part of the law applicable to the liability of the Crown in Australia. Their Honours arrived at the same conclusion based on the operation of section 80 of the Merchant Shipping Act 1906 (Imp.) and the Order in Council (1924) made thereunder. They rejected the argument that the words "as if they were registered in manner provided by those Acts" in section 80 (1) would bring in only those provisions of the Merchant Shipping Acts (Imp.), which applied to a British ship, by reason of registration. In dismissing the appeal, their Honours further stressed the legislative purpose of section 80 as follows:<sup>18</sup>

"What seems to be its concern is to undo the effects of s. 741 where there is an Order in Council and registration of a Government ship and to undo it notwithstanding that

16. S.R. & O., No. 1391 of 1924.

17. (1955-1956) 96 C.L.R. 400.

18. Ibid., p. 420.

registration is not in accord with the Act of 1894...The policy of the provision seems to have been to empower the authorities to except by the Order in Council whatever provisions appeared unsuitable or undesirable but otherwise to submit Government ships to the advantages and disadvantages of the provisions of the Merchant Shipping Act just as if the ships were registered thereunder."

That such fine and circuitous reasoning was necessary to reach the decision shows the oversight of the Commonwealth Parliament. The gaps in the Navigation Act 1912 (Comth.) were closed in 1958 when provisions along the lines of section 5 of the Crown Proceedings Act 1947 (U.K.) were introduced. An amendment was made to Part VIII of the Navigation Act 1912 (Comth.). It extended the benefit of sections 502 to 504,<sup>19</sup> including the other sections ancillary thereto, of the 1894 Act (Imp.) to the Commonwealth or a State as owner of any ship, the manager of such Government ship and also any demise or sub-demise charterer thereof. Moreover, where any ship was built at any port in a Commonwealth country for or to the order of the Commonwealth or a State, the provisions of the Merchant Shipping Act 1894 (Imp.) relating to the limitation of liability of shipowners would apply. The protection would cease when delivery of the ship was taken under the building contract. Part VIII of the Navigation Act 1912-73 continued to apply to Government ships until it was replaced by the new provisions under section 65 (1) of the Navigation Amendment Act 1979 (Comth.).<sup>20</sup>

Seldom in maritime history had the United Kingdom Parliament passed legislation which destroyed consistency in the application of Part VIII of the 1894 Act (Imp.) in Her Majesty's Dominions. The disturbing consequences of disconformity, which the move had given rise to, were exemplified in Bisticic v. Rokov and Others.<sup>21</sup> B, a member of the crew, sued the owners of the ship John Long in the Supreme Court of New South Wales, claiming damages for personal injuries sustained when the ship was in Sydney Harbour. Samuels, J., granted the

19. See Navigation Act 1912-73 (Comth.), ss. 331-335.

20. The Navigation Act 1912-73 (Comth.) is expressed to bind the Crown. See s. 2A and s. 334, as amended by Navigation Amendment Act (Comth.) (No. 87 of 1980), s. 4 and s. 93, respectively.

21. (1976) 11 A.L.R. 129.

declaration sought by the defendant shipowner that their liability was limited according to section 503 of the Merchant Shipping Act 1894 (Imp.). The New South Wales Court of Appeal unanimously affirmed the decision. In the appeal to the High Court of Australia, the major issue raised was whether section 2 (4) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (U.K.) applied in New South Wales. It read:

"Nothing in the said section five hundred and three shall apply to any liability in respect of loss of life or personal injury caused to...a person who is on board or employed in connection with the ship under a contract of service with all or any of the persons whose liabilities are limited by that section, if that contract is governed by the law of any country outside the United Kingdom and that law either does not set any limit to that liability or sets a limit exceeding that set to it by that section."

The injuries occurred on board a New South Wales registered ship in New South Wales waters. The appellant B was employed under a contract of service governed by New South Wales law that set no limit to the liabilities of the employers. Admittedly, by reason of section 4 of the Statute of Westminster 1931, adopted by the Statute of Westminster Adoption Act 1942 (Comth.), section 2 (4) of the 1958 Act (U.K.) did not extend as part of the law of the Commonwealth. The reason was the absence of a declaration required by section 4 of the 1931 statute (Imp.). It was ably contended that section 4 did not apply to the Australian States, and that an Act of the United Kingdom **not** containing such declaration might nevertheless apply to the States. Their Honours rejected the contention for a number of reasons. Firstly, by section 10 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958, the Act extended to Northern Ireland. Section 11 empowered Her Majesty by Order in Council to direct that the provisions of the Act and the "existing limitation enactments" would extend to the Isle of Man, any of the Channel Islands and any colony or country outside Her Majesty's Dominions. The words "any colony" in section 11 has no application to any Australian State. By section 11 of the Statute of Westminster 1931 (Imp.), the expression "colony" in any Imperial Act passed after the operation of the former would not include a Dominion or any Province or State forming part of a Dominion. Secondly, no Australian State is regarded as a country outside Her Majesty's Dominions. Thirdly, the policy evolved over a long history of constitutional development is that, for a statute of the

United Kingdom to extend to an Australian State, it would have to contain an express provision to that effect. On similar ground was rejected the argument that, since the 1894 Act (Imp.) enunciated the law for New South Wales, any amendment to that Act should be approached on that footing.

In underlining the anomalous situation that could arise from the difference between English and Australian laws in this area, Jacobs, J. said:<sup>22</sup>

"Assume a collision between two ships with personal injuries to members of the crew of each ship. An action is commenced in the United Kingdom for limitation by the owners of both of the ships...The plaintiffs whose service on board their ship was under a contract governed by the provisions of s. 503 vis-a-vis their owner. The plaintiffs whose service was on board the other ship are not bound by the provisions of s. 503 vis-a-vis their owner."

Section 2 (4) of the 1958 Act (U.K.) favoured shipowners by discriminating against those engaged on board whose contract of employment was subject to the law of the United Kingdom. The provision reflects a significant change in legislative thinking. This is in marked contrast to the policy which underlay the Privy Council decision in The Amalia<sup>23</sup> and the Merchant Shipping Amendment Act 1862 (Imp.). The Imperial Parliament then had assumed jurisdiction by limiting the liability of British and foreign ships in international waters. Section 2 (4) only operated in Britain, Northern Ireland and certain places in Her Majesty's Dominions and applied to persons employed in ships.

The replacement provisions of the Merchant Shipping Act 1979 (U.K.)<sup>24</sup> follow the rational approach set by section 2 (4) of the 1958 Act (U.K.). They distinguish seamen and other employees from goods and passengers carried on board. Their laudable object is to take cognizance of the rights of ship's employees acquired under non-United Kingdom law. Moreover, it is grossly unethical for the United Kingdom or the Commonwealth Parliament to pass a law which lessens the quantum of damages recoverable by an employee under a foreign

22. Ibid., p. 136.

23. (1863) 8 L.T. Rep. (N.S.) 805; see also p. 810 where the application of Merchant Shipping Amendment Act 1862 (Imp.), s. 54, was considered.

24. See Schedule 4 Part I, Article 3 para. (e).

law or a contract of service with a foreign employer.

Further reference to the anomaly highlighted by Jacobs, J., helps our understanding of the problem. Suppose that an injured seaman was employed under a contract of service subject to a foreign law which did not limit the liability of his employer. If he sued in an English court, then by reason of section 2 (4) of the 1958 Act (Imp.), section 503 of the 1894 Act (Imp.) was rendered inapplicable. His rights under the foreign law, which was presumably the proper law of the employment contract, would remain intact. If, on the other hand, he had sued or his employer had initiated proceedings to limit his liability in an Australian court, it was certain what the outcome would have been. Since section 2 (4) of the 1958 Act (Imp.) did not extend to Australia, the operation of section 503 was therefore not excluded. The undesirable outcome was that in an Australian court the damages awarded to an accident victim would be subject to the limitation of liability. Unfortunately, the current position under Australian law has not changed.

The Navigation Amendment Act 1979 (Comth.) has given effect to the International Convention relating to the Limitation of Liability of Shipowners of Sea-going Vessels 1957. Section 65 (1) repealed Part VIII of the Navigation Act 1912-73 (Comth.) and substituted a new Part VIII. This Part provides for the limitation and exclusion of the liability of shipowners.

The far-reaching effects of the Navigation Amendment Act 1979 (Comth.) on the development of Australian maritime law are further considered. By section 104 (3), Part VIII of the 1894 Act (Imp.) was repealed. With the exception of paragraph 1 (c) of Article I, the provisions of the 1957 Convention are, under section 333 of the Navigation Act 1912-73 (Comth.), given "the force of law as part of the law of the Commonwealth." In the recent epoch-making case of Kirmani v. Captain Cook Cruises Pty. Ltd.<sup>25</sup>, two constitutional questions of importance were raised. The first question concerned the validity of the repeal of Part VIII of the 1894 Act (Imp.) by section 104 (3). The second was whether the Commonwealth Parliament was competent to enact shipping legislation on limitation of liability which extended to the States. Pursuant to section 40 of the Judiciary Act 1903 (Comth.), the

25. (1985) 59 A.L.J. 265.

case was removed from the District Court of New South Wales to the High Court.<sup>26</sup> The facts which gave rise to the action were fairly straightforward. On 9th August, 1981, while being carried on a cruise in Sydney Harbour in Captain Cook II, a vessel owned by the defendant company, the plaintiff K suffered personal injuries. These were alleged to have been caused by the negligence of the defendant company. When sued for damages, the defendant company claimed to be entitled to limit its liability under section 503 of the 1894 Act (Imp.). The plaintiff contended that the section had been repealed on 31st January, 1981,<sup>26</sup> when section 104 (3) of the Navigation Amendment Act 1979 (Comth.) came into force. Section 2 (2) of the Statute of Westminster 1931 (Imp.) and section 51 (xxix) of the Commonwealth of Australia Constitution Act 1900 (Imp.) (dealing external affairs) were held to empower and authorise the Commonwealth Parliament to repeal Part VIII of the 1894 Act (Imp.) by section 104 (3) of the 1979 Act (Comth.). Apart from the wide scope of the legislative powers conferred by section 2 (2) of the 1931 statute (Imp.), the adoption of the 1957 Convention under section 333 of the Navigation Act 1912-73 (Comth.), as amended, is clearly within the "external affairs" provision. A feature of the decision which has a vital bearing on the development of Australian law is this. Captain Cook II was, and had always been, an intra-State, and not a sea-going, vessel. The personal injuries were allegedly sustained within New South Wales internal waters. Section 334, as amended, provides that certain ships, not being sea-going vessels, were to be treated as though they were sea-going vessels for the purposes of Division 1 of the new Part VIII of the Navigation Act 1912-73 (Comth.) and the applied provisions of the 1957 Convention. The section has been further amended by section 93 of the Navigation Amendment Act 1980 (Comth.) to embrace an intra-State pleasure craft. Mason, Murphy, Brennan, and Deane, J.J.,<sup>27</sup> held that the power of the Commonwealth Parliament extended to the repeal of the operation of Part VIII of the 1894 Act (Imp.) not only as part of Commonwealth law but also as part of the law of each of the Australian

26. Ibid., p. 278.

27. Wilson, J.'s dissent only related to intra-State vessels which are not sea-going vessels.

States.<sup>28</sup> If by reason of the repeal, the provisions of the new Part VIII were held to operate merely as Commonwealth law and not also as part of the State laws, grave flaws and uncertainties would arise. Wilson, J., has highlighted the situation in these words:<sup>29</sup>

"It might be said that...the lack of any protection would endure only until the State legislatures, now freed by reason of the repeal of s. 503 from the constraints of the Imperial Act, passed their own legislation. That may be so, but the lack of protection in the intervening period could be very serious indeed. This was recognized by the Parliament in respect of intrastate vessels which go to sea."

The problem has been overcome by section 332 (3), as amended. It provides that Division I of Part VIII will not apply to an intra-State vessel to the extent that a law of a State or of the Northern Territory applies the provisions of the 1957 Convention in relation to that vessel. The historic High Court decision does not deprive the Parliament of a State or the Northern Territory of the competence to give effect to the 1957 Convention.

We shall look at the other changes introduced by the Navigation Amendment Act 1979 (Comth.). Under Article I paragraph I of the 1957 Convention, limitation of liability applies to claims arising from -

- "(a) loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;
- (b) loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers."

The protection avails in suits brought against the ship and a wide class of persons. These include the charterer, manager and operator

28. The Solicitors-General and Attorneys-General of New South Wales, Queensland and Western Australia intervened on behalf of the States named.

29. (1985) 59 A.L.J. 265, p. 279.

of the ship and also the master, crew members and other servants of the owner, charterer, manager or operator of the ship. However, apart from the master and crew members, each of the other persons will only be entitled to limit his liability where the losses have occurred without his actual fault or privity.<sup>30</sup> Under the Navigation Amendment Act 1979 (Comth.), the category of persons whose liability in connection with a ship is limited is wider than that under Part VIII of the 1894 Act (Imp.) at the time of the repeal. The protection has been extended to cover claims for personal injury or death caused to any person and loss or damage caused to property - outside a ship in each case.

An outstanding benefit to shipowners, charterers and operators based in Australia lies in the reduced premiums charged for third-party liability policies.

## VI. RESPONSIBILITY OF SHIPOWNERS

### 1. Relationship between Actual Fault or Privity and Unseaworthiness

It will be recalled that the expression "fault or privity" was first used in the Responsibility of Shipowners Act 1813 (Imp.). This modification of the vicarious liability of shipowners for the acts or defaults of their servants reinforced the Imperial shipping policy. Except for the addition of "actual",<sup>31</sup> the expression has been consistently retained as part of Australian maritime law.

The expression has never been defined in the Imperial Acts<sup>32</sup> and the 1957 Convention.<sup>33</sup> An analysis of the case authorities is

30. 1957 Convention, Article VI, para. 2; cf. para. 3.

31. 53 Geo. III, c. 159, s. 1. The words "privity and knowledge of ...owner" were used in the Responsibility of Shipowners Acts of 1734 (Imp.) (7 Geo. II, c. 15), s. 1, and 1786 (Imp.) (26 Geo. III, c. 86), s. 1.

32. See ss. 503 and 504 (repealed) of 1854 Act (Imp.); ss. 502 and 503 (repealed) of 1894 Act (Imp.).

33. See the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Article 1 para. 1. The expression, however, has been abandoned by the Convention on Limitation of Liability for Maritime Claims 1976. It favours "personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" as the conduct which bars the limitation of liability: Merchant Shipping Act 1979 (U.K.), Schedule 4, Part I Article 4.



necessary in order to ascertain its meaning and application. It enables us to evaluate the relief conferred on shipowners early in history and other persons at the later stages.

In The Spirit of the Ocean,<sup>34</sup> Dr. Lushington spoke of section 504 of the Merchant Shipping Act 1854 (Imp.) as being applicable when the shipowners "have not incurred any blame as to the collision in question." He added that "it is personal blame which is the ground of the forfeiture of the exemption from liability."<sup>35</sup> The shipowners were held liable as principals for the negligent navigation of the master. Butt, J., in The Warkworth<sup>36</sup> said that "the words ['actual fault or privity'] shew an intention to relieve the shipowner when damage has been caused by the fault of his servants and he himself has not been in any way to blame." In The Diamond, the cargo carried was damaged by fire on board the ship. Judgment was given for the shipowner on the ground that the matter fell within section 502<sup>37</sup> of the Merchant Shipping Act 1894 (Imp.). Bagnall, Deane J.,<sup>38</sup> said that the "owner is not liable unless he has himself been guilty of some fault or privity to the matters which caused the damage." One inference to be drawn from the judicial pronouncements is this. It is the intention of the legislature and convention formulators to differentiate the fault or privity of shipowners from that of their employees. The provisions distinguish between the responsibility of shipowners for their own acts or defaults and their liability for the wrongful or negligent conduct of their servants. The object of the law is to limit their liability according to the tonnage of the ship. A rather similar construction was placed by Hamilton, L.J., on the expression in section 502, when he said:<sup>39</sup>

"Actual fault negatives that liability which arises solely under the rule of 'respondeat superior'. In that sense it

34. (1865) 12 L.T. (N.S.) 239.

35. *Ibid.*, p. 239.

36. (1883) 9 P.D. 20, p. 21, confirmed on appeal; cited with approval by Hamilton, L.J., in Asiatic Petroleum Co. Ltd. v. Lennard's Carrying Co. Ltd. [1914] 1 K.B. 419, p. 437.

37. Replaced by Merchant Shipping Act 1979 (U.K.), s. 18; see also Navigation Act 1912-73 (Comth.), s. 338, as amended by Navigation Amendment Act 1976 (Comth.), s. 65 (1).

38. [1906] P. 282, p. 287.

39. [1914] 1 K.B. 419, p. 436, *supra*.

conveys the idea of personal fault, but it does not necessarily mean that the owner must have laid the train or set the torch himself."

From the comparative aspect, it is relevant to consider the relationship between the personal responsibility of the shipowner under the Merchant Shipping Act 1894 (Imp.) or the Navigation Act 1912-73 (Comth.) and the seaworthiness obligation of the carrier under the Hague Rules.<sup>40</sup> Rule 1 of Article III of the Hague Rules provides that the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy in those respects required. The House of Lords decision in Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co.<sup>41</sup> makes it clear that due diligence must be exercised by the carrier as a personal obligation. It is non-delegable in that he is responsible for the acts or negligence of every person employed by him to render the ship seaworthy. Suppose that due to the negligence of a compass repairer the ship came into collision with an oil rig or due to the default of a surveyor a fire broke out on board. If, as a result of the ship's unseaworthiness at the commencement of the voyage, cargo is damaged in each case, the Hague Rules carrier is liable.<sup>42</sup> It is questionable whether failure to fulfil this seaworthiness obligation would constitute "actual fault or privity" under sections 502 and 503 of the 1894 Act (Imp.) and the corresponding provisions of the Navigation Act 1912-73 (Comth.). The carrier under the Hague Rules is often the demise charterer or owner of the carrying ship, who may be protected under the Imperial or Commonwealth Act. It appears that non-fulfilment of the seaworthiness obligation, whether at common law or under the Hague Rules, often connotes a less serious breach than "actual fault or privity" on the

40. Scheduled to Sea-Carriage of Goods Act 1924-73 (Comth.) and also to Carriage of Goods by Sea Act 1924 (U.K.), repealed by Carriage of Goods by Sea Act 1971 (U.K.).

41. [1961] A.C. 807. In Maxine Footwear v. Canadian Government Merchant Marine [1959] A.C. 589, pp. 602-603, Lord Somervell pointed out: "Article III Rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied upon...."

42. See Union of India v. N.V. Reederij Amsterdam [1963] 2 Lloyd's Rep. 223.

part of the shipowner or demise charterer.<sup>43</sup>

In Louis Dreyfus & Co. v. Tempus Shipping Co.,<sup>44</sup> the bunker coal was unfit for the voyage. A dangerous fire broke out on board the ship. She put into a port of refuge. Expenses for the benefit of the ship and cargo were incurred. The unfitness of the bunker coal constituted the unseaworthiness of the ship and therefore a breach of the contract of carriage. However, the House of Lords found that the loss of or damage to the goods occurred by reason of fire, without any actual fault or privity on the part of the shipowners. The shipowners were held to be entitled to complete relief under section 502 of the 1894 Act (Imp.), and to claim contribution from the cargo owners in respect of the general average expenses incurred.

The reasoning of the House of Lords would equally have applied to a similar situation arising under a contract of carriage governed by the repealed Carriage of Goods by Sea Act 1924 (U.K.). Section 6 (2) read:

"Nothing in this Act shall affect the operation of sections...five hundred and two and five hundred and three of the Merchant Shipping Act 1894, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of seagoing vessels."

The unambiguous wording underlined the British legislative intention to continue intact what had been a cardinal feature of English maritime law. Under the Hague Rules, it is immaterial whether the unseaworthiness is the result of any default or omission of an independent contractor e.g. ship repairer engaged by the carrier, or the actual fault or privity of the carrier. A breach of the seaworthiness obligation does not automatically imply actual fault or privity within the meaning of the repealed section 502 of the 1894 Act (Imp.)<sup>45</sup> or

43. The position under English law is well stated in Scrutton on Charterparties, op. cit., (19th ed. 1984), p. 238. According to its learned authors: "The exemption under this section [s. 502] is not conditional upon the fulfilment of the implied warranty of seaworthiness. Therefore proof that the fire was caused by unseaworthiness will not destroy the statutory protection...." As will be seen shortly, it is probable that this rule does not apply in Australia.

44. [1931] A.C. 726; also in the earlier case of Virginia Carolina Co. v. Norfolk S.S. Co. [1912] 1 K.B. 229, the English Court of Appeal held that a shipowner was not deprived of the protection of s. 502 merely because the fire was caused by the ship's unseaworthiness in breach of the warranty implied by law.

45. Replaced by Merchant Shipping Act 1979 (Imp.) (c. 39), s. 18 (1).

section 338 of the Navigation Act 1912-73 (Comth.).<sup>46</sup> It is arguable that a carrier, who would otherwise be liable under the old Carriage of Goods by Sea Act 1924 (U.K.)<sup>47</sup> for cargo damage caused by fire on board resulting from the ship's unseaworthiness, would not be precluded from invoking section 502. The prerequisite for the statutory protection was absence of actual fault or privity and not the exercise of due diligence.

Two further inferences may be drawn regarding the relations between a shipowner's responsibility under section 502<sup>48</sup> and a carrier's obligations under the Hague Rules. First, since the greater embraces the lesser, actual fault or privity of a shipowner as carrier should include a breach of the seaworthiness obligation under Article III rule I. Second, actual fault or privity resulting in fire damage to cargo will prevent a carrier from invoking the immunity in Article IV rule 2 (b). This defence of "fire unless caused by the actual fault or privity of the carrier" will therefore not avail as an exception to the "cargo care" obligation in Article III rule 2.<sup>49</sup> It is submitted that, like the position under the repealed section 502 of the 1894 Act (Imp.), or section 338 of the Navigation Act 1912-73 (Comth.), the burden of proving the absence of actual fault or privity under the exception in Article IV rule 2 (b) rests on the carrier.

However, despite the English decisions,<sup>50</sup> there is a Privy Council judgment which goes the other way. In Maxine Footwear Co. v. Canadian Government Merchant Marine,<sup>51</sup> which was governed by Canadian law, the carrier was held responsible for fire damage. It was found that the shipowner's servants had not exercised due diligence before and at the commencement of the voyage. The decision can be explained on this ground. Under the Hague Rules, where the

46. As amended. See Navigation Amendment Act 1979 (Comth.), s. 65 (1).

47. Replaced by Carriage of goods by Sea Act 1971 (U.K.), s. 6 (3).

48. Navigation Act 1912-73 (Comth.), s. 338, as amended.

49. See also Sea-Carriage of Goods Act 1924-73 (Comth.).

50. I.e. Louis Dreyfus & Co. v. Tempus Shipping Co [1931] A.C. 726; Virginia Carolina Co. v. Norfolk S.S. Co. [1912] 1 K.B. 229.

51. [1950] 2 Lloyd's Rep. 105.

seaworthiness is not met, the carrier cannot rely on the defence in Article IV rule 2 (b). However, a learned author is of the view that under English law a different decision would have been reached.<sup>52</sup> It is submitted that, with regard to loss or damage due to fire, the position under the Hague Rules differs from that at common law.

Admittedly, there was some uncertainty as to the effect of the repealed section 502 on the "due diligence" obligation imposed by Article III rule 1. It appears that, to remove the difficulty, the Commonwealth Parliament opted for a provision which differed from that in section 6 (2) of the repealed Carriage of Goods by Sea Act 1924 (U.K.). The reason is that, prior to the enactment of the Navigation Amendment Act 1979 (Comth.), Part VIII of the Merchant Shipping Act 1894 (Imp.), including sections 502 and 503, applied to the Commonwealth as part of its law. Section 10 (1) of the Sea-Carriage of Goods Act 1924-73 (Comth.) reads:

"Nothing in this Act shall affect the operation of Division 10 of Part IV of the Navigation Act 1912-1920 or the operation of any other Act for the time being in force limiting the liability of the owners of seagoing vessels."

The omission from the sub-section of reference to section 502 of the Merchant Shipping Act 1894 (Imp.) is significant.<sup>53</sup> It indicates the intention of the Commonwealth Parliament to prevent a carrier, who is liable under the Sea-Carriage of Goods Act 1912-73 (Comth.) for fire loss or damage occurring on board due to the ship's unseaworthiness, from invoking section 502 of the 1894 Act (Imp.).<sup>54</sup>

With regard to the limitation of liability, there is as a matter of principle inconsistency between the Sea-Carriage of Goods Act 1924-73 (Comth.) and Part VIII of the Navigation Act 1912-73 (Comth.). Under the former Act, a carrier's liability is limited to two hundred

52. W. Tetley, Marine Cargo Claims (2nd ed. 1978), p. 190. Cf. Sir A. Mocatta, Sir M. Mustill and S. Boyd, Scrutton on Charterparties and Bills of Lading (19th ed. 1984), pp. 448-449.

53. Cf. Carriage of Goods by Sea Act 1924 (U.K.), s. 6 (2) (repealed).

54. Part VIII of the Merchant Shipping Act 1894 (Imp.), as amended, including sections 502, 503 and 504, has been repealed by Navigation Amendment Act 1979 (Comth.), s. 104 (3). Part VIII has been substituted by 65 (1) of the 1979 Act (Comth.), supra.

Australian dollars per package or unit of the goods lost or damaged. This liability limit applies irrespective of whether the breach of the "seaworthiness" or "cargo care" obligation is the result of actual fault or privity of the shipowner or charterer as carrier, or the neglect or omission of his employees.<sup>55</sup>

As a policy matter, an attempt was made by the Brussels Protocol 1968 to differentiate between the actual fault or privity of the carrier and the neglect or omission of his servants as the cause of the cargo loss or damage. Obviously, in drawing the vital distinction between the two types of fault, the Protocol had adopted the underlying philosophy of sections 502 and 503 of the 1894 Act (Imp.).<sup>56</sup> It is unfortunate that, in distinguishing between the two types of fault, the formulators of the Protocol had not opted for consistency by using the expression "actual fault or privity." Article 2 (e) of the Protocol reads:

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability...if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."

The Hague Rules, as amended by the Brussels Protocol 1968, are scheduled to the Carriage of Goods by Sea Act 1971 (U.K.), which has been in force in the United Kingdom since 23rd June, 1971.

Further differences between the law of Australia and that of the United Kingdom have arisen. Under the latter law, the limitation of liability will in normal circumstances avail the carrier or the shipowner in an admiralty action in rem, except where the damage is caused intentionally or knowingly. Article (2) (e) expressly deals with those situations where the statutory protection is unavailable. If the court applies the maxim expressio unius est exclusio alterius in construing the provision, it may exclude the application of the common law doctrine of deviation or quasi-deviation. The effect is

55. Except of course where an unjustified deviation or quasi-deviation has occurred, abrogating the special contract. See supra.

56. Substituted by Merchant Shipping Act 1979 (U.K.), ss. 18 and 17, respectively.

that unjustified deviations or quasi-deviations will no longer break the limit of liability except when the conditions of Article 2 (e) are satisfied. Moreover, its wording and the ingredients to be established show the onerous nature of the burden of proof to be discharged by the cargo claimant.

The Hague Rules scheduled to the Sea-Carriage of Goods Act 1924-73 (Comth.) permit the limitation of liability to be abrogated in instances of unjustified deviation or quasi-deviation at common law. Such fundamental breaches of a contract of carriage will enable a cargo claimant to recover up to the limit set by the Navigation Amendment Act 1979 (Comth.). Recovery beyond the statutory limit is only possible where the cargo loss or damage is caused by the actual fault or privity of the shipowner, charterer or ship operator. As will be seen later, contrary to the current position under the Merchant Shipping Act 1979 (U.K.),<sup>57</sup> under Article 1 (1) of the 1957 Convention the owner of a sea-going vessel has the burden of proving the absence of actual fault or privity as the cause of the loss or damage. This rule of evidence, no doubt, favours cargo claimants. In practice, however, certain difficulties are encountered by cargo claimants under the Sea-Carriage of Goods Act 1912-73 (Comth.). It is unclear whether, in every case of unjustified deviation or quasi-deviation at common law, a cargo claimant is entitled to presume that it has occurred as a result of actual fault or privity of the shipowner or charterer. It is submitted that a cargo claimant should be given the benefit of such a presumption, leaving it to the carrier or shipowner to prove otherwise.

## 2. Personal Blameworthiness of Shipowner

In James Patrick and Company Ltd. v. The Union Steamship Company of New Zealand Ltd.,<sup>58</sup> Dixon, J., identified the areas in which culpability on the shipowner's part can arise. He said:<sup>59</sup>

"The primary responsibility of a shipowner is for the seaworthiness of his ship, the sufficiency of her manning, the selection of her master and officers and the supply of all proper furnishings and provisions."

57. See Schedule 4 Part I, Article 4.

58. (1938) 60 C.L.R. 650.

59. Ibid., pp. 670-671.

In practice, a shipowner often has to entrust the discharge of different aspects of this onerous duty to his servants or agents. Failure or omission by such persons or independent contractors employed by a shipowner to carry out the work may not render him personally culpable.

Actual fault or privity may be attributed to the neglect or imprudent act of a shipowner, although the defect was present in the ship at the time of her acquisition or as a result of the ship's design. The facts of the House of Lords case of Standard Oil Company of New York v. Clan Line Steamers Ltd.<sup>60</sup> are somewhat unusual. A vessel of the turret type was unseaworthy in that she could not safely undertake a voyage with a homogeneous cargo unless her lower tanks were filled with at least 290 tons of water. In 1909, a sister ship on a voyage from Australia to South Africa, laden with flour and grain, overturned and sank in fine weather, with the loss of forty men. Shipbuilders had sent out to owners of such ships a series of instructions as to the precautions to be taken to prevent the recurrence of similar misfortune and to secure their stability. On leaving New York, the Clan Gordon was laden with a cargo of homogeneous character. Her master ordered two water tanks to be emptied. The vessel heeled over, turned turtle, and was totally lost with her cargo. The instructions had never been communicated to the ship's master. In respect of the cargo owners' claim, the House of Lords had no difficulty in holding that the shipowners were not entitled to limit their liability under section 503. The shipowners were in breach of their personal responsibility in two respects. They sent to sea a ship which they knew was unfit for the particular voyage, and had flagrantly omitted to pass on to the master those instructions which could have prevented the disaster.

To constitute a breach of the principle of personal responsibility, it is not necessary that shipowners at the time of sending the

60. [1924] A.C. 100; see also Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705, where the effective cause of the fire was the ship's unseaworthiness in that the boilers were defective. The shipowners were unable to rely on s. 502 because they failed to discharge the onus of establishing that the fire occurred without their actual fault or privity.



ship to sea should have had actual knowledge of her unseaworthy condition. In The Bristol City,<sup>61</sup> an unfinished ship was sent by the plaintiff shipowners and builders in tow of two tugs from Bristol to Cardiff. She had on board only one anchor, no cables, no windlass and no hawsers. After taking on board her engines at Cardiff, she was taken back by a single tug. The tow rope, being in a defective condition which was unknown to the plaintiffs, parted. As the Bristol City's only anchor could not hold, she drifted and caused extensive damage to the John Ena. The plaintiffs sought to limit their liability under section 503. Both the trial judge and the English Court of Appeal found that the want of proper ground tackle was the real cause of the accident. The appeal was unanimously dismissed. In delivering the judgment, Lord Sterndale, M.R. made the point that shipowners and shipbuilders "must be taken to know something about their business, and the equipment necessary to make a vessel seaworthy."<sup>62</sup> Thus neglect or failure by shipowners to equip a ship sufficiently and constructive knowledge of her unseaworthiness sufficed to constitute actual fault or privity for the purpose of section 503.

To ensure safety in navigation and maritime transportation, international conventions often require sea-going ships to be installed with certain equipments in the manner prescribed. By section 94 of the Navigation Amendment Act 1979 (Comth.) effect is given to the Convention on the International Regulations for Preventing Collisions at Sea 1972. Rule 1 (a) provides that the "Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels." The regulations deal with the positioning of lights and shapes, sound and light signals and other appliances to be installed on the ship. Moreover, the Navigation Act 1912-73 (Comth.) contains a number of provisions making it obligatory for ships to carry compasses, to be installed with radio equipments and to observe the collision regulations. For example section 234 reads:

"If a ship is not equipped with compasses in accordance with the regulations, or the compasses on the ship have not been adjusted in accordance with the regulations, the ship shall, for the purposes of this Act, be deemed to be unseaworthy."

61. [1921] P. 444 (C.A.).

62. Ibid., p. 451.

It is reasonable to presume that these statutory requirements are imposed as part of the personal responsibility of shipowners.

Most of the above provisions are fairly similar to those enacted under the Merchant Shipping Act 1894 (Imp.). That the presumption seems to be correct is borne out by the English decision in The Truculent.<sup>63</sup> On 12th January, 1950, a collision occurred in the Thames Estuary between the H.M. Submarine Truculent and the Swedish steamship Divina. Both vessels were to blame. The Truculent sank almost instantly with the loss of sixty-four lives. Those in charge of the Divina alleged that the lights exhibited on The Truculent were not in accordance with the Regulations for the Prevention of Collision at Sea enacted under section 418 of the 1894 Act (Imp.). Section 741, however, exempted His Majesty's ships from the operation of the Act. But by Chapter XVI of the King's Regulations and Admiralty Instructions, provisions identical with the collision regulations were applicable to His Majesty's ships. Those in charge of the Divina were misled by the lights on The Truculent. The only lights visible on the latter, viz. the green and white, appeared very close together and both very low, giving the impression that the approaching vessel was something very small, such as a motor launch or yacht. The King's Regulations and Instructions were published to the world at large. Willmer, J., correctly held that the Admiralty had accepted on behalf of His Majesty's ships the same duty to obey the collision regulations as was imposed on other vessels. He found that there had been a breach by The Truculent of such duty owed to other vessels, e.g. the Divina. It was the omission or neglect of the Admiralty to issue any notice warning of submarines navigating on the surface at night. By reason of section 5 (1) of the Crown Proceedings Act 1947 (Imp.),<sup>64</sup> the Admiralty which were in the position of owners of The Truculent applied to limit His Majesty's liability under section 503 of the Merchant Shipping Act (Imp.). Evidence showed that the Third Sea Lord, with the authority of the full Board of the Admiralty, had approved plans for the positioning of submarines' lights which were not in accordance the collision regulations. The claim on behalf of His Majesty for the limitation of liability was

62. Ibid., p. 451.

63. [1952] P. 1.

64. S. 5 substituted by Schedule 5 para. 3, Merchant Shipping Act 1979 (U.K.).

dismissed. It is clear that the principle imposing personal responsibility on shipowners was breached. This occurred when the Third Sea Lord's approval was given for the installation of those lights in contravention of the collision regulations, and the Admiralty failed to issue warning notice.

In determining whether the Admiralty could be fixed with actual fault or privity, the learned judge applied the principles laid down by Viscount Haldane, L.C., in identifying the "directing mind" of a limited company.<sup>65</sup> Thus, the Third Sea Lord was to the Board of the Admiralty what the managing director, as an alter ego, or the board of directors is to the company.

During the last two decades, the concept of actual fault or privity has been given a broader scope, probably in the light of new technology and developments in business practices. One consequence is to impose on shipowners a higher standard of personal responsibility. Actual fault occurs through failure to make themselves aware of what they ought to know. It may consist in being privy to the neglect, unskillfulness, improper act or omission of a servant or agent. In each case, the loss or damage must have occurred through want of appropriate steps being taken to rectify the situation.

The two types of breach by shipowners are exemplified in the English Court of Appeal decision in Arthur Guinness, Son & Company (Dublin) Ltd. v. The Freshfield (Owners) and Others.<sup>66</sup> The Lady Gwendolen owned by the appellants collided with, and sank the Freshfield which was at anchor. The collision occurred in dense fog with the Lady Gwendolen going at full speed. It was found that R, the marine superintendent, and B, the traffic manager, were unaware that for years the master had "habitually navigated the vessel in fog at excessive speed." Apart from attending a radar observers' course, the master had no experience of radar and not received

65. [1952] P. 1, p. 21; see also Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705, pp. 713-714.

66. [1965] P. 294.

any instruction in the proper use of radar in connection with navigation in fog. R and B made no attempt to draw his attention to notice M, published by the Ministry of Transport in December, 1960, relating to navigation with radar in poor visibility. Moreover, as R and B were totally unaware of the master's habit of going at full speed in dense fog, they had failed to warn him of the grave risks involved. That the personal responsibility of shipowners had been breached by the assistant managing director, B, and R was clear. They had failed in their responsibility to make themselves aware of the navigational problems in the use of radar, to emphasise to the master the urgency of these problems, and to take steps to ensure the safe navigation of the ship. The English Court of Appeal unanimously upheld the decision of the trial judge that the shipowners were guilty of actual fault and were therefore not entitled to the decree of limitation of liability.

It is interesting to note, in the judicial reasoning, indications of a modern approach to the problems of omission, default or neglect by those involved in discharging the personal responsibility of shipowners. Willmer, J., was of the view that there was a lack of managerial control over the navigation of the appellants' ships, and that improper management had contributed to the collision.

### 3. The Management Concept

It is immaterial whether the management of a ship is undertaken by her owners or by a body corporate. The courts have moved in the right direction by taking cognizance of the changes in the pattern of ship operations and shipping practices of the second half of the twentieth century. In adopting the concept of ship management as a new criterion, the courts are really re-defining the personal responsibility of shipowners. Included in the province of ship management are certain matters which, in the past, were deemed to be part of a master's duties. Apparently, the first case where the ship management doctrine was applied in relation to a specific equipment was The Norman.<sup>67</sup> The House of Lords threw

67. Northern Fishing Co. (Hull) Ltd. v. Eddom, The Norman [1960] 1 Lloyd's Rep. 1 (House of Lords).

fresh light on the extent of the managerial duties of owners and managers, particularly with regard to the provision of navigational information and publications to the ship. This decision represented a new approach. It was no longer permissible for shipowners or managers to leave all matters of navigation completely to the unassisted discretion of ships' masters. Another decision which supports the doctrine is Rederij Erven H. Groen and Groen v. The "England" (Owners).<sup>68</sup> For the collision between the m.v. Alletta owned by the plaintiffs, in the limitation action, and the m.v. "England" owned by the defendants, the former were found to be four-fifths to blame. The issue was whether G, the managing owner of m.v. Alletta, was guilty of actual fault which had contributed to the collision. He had failed to take any proper steps to ensure that the ship's master had on board and available for use the latest Port of London River bye-laws. The Court of Appeal reversed the decision of the Admiralty Court judge and held that G was guilty of actual fault in respect of such failure. In delivering his judgment, Sir Gordon Willmer said:<sup>69</sup>

"It seems to me that any company which embarks on the business of shipowning must accept the obligation to ensure efficient management of its ships to enjoy the very considerable benefits conferred by the statutory right to limitation."

A fairly recent authority which endorses the management doctrine is the House of Lords decision in Grand Champion Tankers Ltd. v. Norpipe A/S and Others.<sup>70</sup> While weighing anchor at Teeside the appellants' Liberian tanker, the Marion, negligently fouled and severely damaged a pipeline on the seabed carrying oil. Undoubtedly, the immediate cause of the damage was the negligence of the Marion's master. He navigated the tanker by reference to a long obsolete chart on which the pipeline was not shown. An English company (FMSL) had been delegated the entire management and operation of the Marion. The Liberian Bureau Maritime Affairs issued an

68. [1973] 1 Lloyd's Rep. 373, reversing trial court decision; [1972] 1 Lloyd's Rep. 375.

69. [1973] 1 Lloyd's Rep. 373, p. 383.

70. [1984] 2 All E.R. 343.

inspectorate report on the Marion containing the devastating comment "Nav. charts for trade of vessel corrections omitted [sic] for several years." Six weeks after receiving the report, G, employed by FMSL in a managerial capacity, wrote to the Marion's master. However, the master failed to comply with G's written requests to take steps to ensure that all charts and navigational publications were regularly updated as required. There was no effective follow-up on the matter by G and L (G's other managerial colleague), D, the managing director of FMSL and who had been away, became aware of the inspectorate report only after the pipeline damage. The owners of the Marion were found guilty of two actual faults. These were attributed to D's failure to have a proper system of supervision in relation to charts and to give L and D sufficiently clear, precise and comprehensive instructions as to the matters about which he was to be kept informed during his absence. Both failures are seen as managerial faults. It is submitted that "efficient management", which is sufficiently flexible, should now be adopted as the sole formula to evaluate the proper exercise and discharge of shipowners' personal responsibility. The new doctrine is founded on the words of Lord Brandon who delivered the single House of Lords judgment. He said:<sup>71</sup>

"My Lords, I am of the opinion that what Sir Gordon Willmer there described as 'The relatively new approach' begun by your Lords' House in The Norman in 1960 and continued...in The Lady Gwendolen in 1965 and The England in 1973, should now be regarded as the correct approach in law to the problem of actual fault of shipowners or ship managers in contested limitation actions."

Our reliance on English authorities for the study of the development of this aspect of Australian law is unavoidable for several reasons. Until the repeal and replacement of Part VIII of the Merchant Shipping Act 1894 (Imp.) (including sections 502 and 503) by the provisions of the Navigation Amendment Act 1979 (Comth.), Part VIII had operated as part of the law of the Commonwealth. Australian decisions based on sections 502 and 503 are not many in number and naturally tend to follow the judicial pronouncements of English judges. The adoption by the Navigation Amendment Act 1979 (Comth.) of the International Convention relating to the Limitation of the Liability of Sea-going Ships 1957, as Commonwealth law, is

71. Ibid., p. 347.

unlikely to produce a situation where Australian judges will construe the words "actual fault or privity" differently from their English counterparts in the past. The reason is that the United Kingdom and probably over thirty other countries had also given effect to this 1957 Convention in their national laws.<sup>72</sup> To achieve the desired goals, the trend had been towards harmony and consistency in the interpretation of those key words.

Undoubtedly, the major problem confronting owners and managers of ships in limitation actions is the burden of proof. Neither the 1957 Convention nor the pre-convention legislation made any provision as to the party required to meet it. In the High Court of Australia case of James Patrick and Company Ltd. v. The Union Steamship Company of New Zealand Ltd.,<sup>73</sup> the owners of the s.s. Caradale sought to limit their liability under sections 503 and 504 of the Merchant Shipping Act 1894 (Imp.) for collision damage caused to another ship. Dixon, J., expounded with remarkable clarity the onus incumbent upon the applicants when he said:<sup>74</sup>

"For the burden of proof in the present proceedings is upon the opposite party, the owners of the Caradale. Unless they discharge the burden of excluding actual fault or privity on their part, they cannot obtain a decree for the limitation of their liability, and, if a given fact or state of facts would stand in the way of their doing so, it is enough that its existence appears probable or even to be a reasonable supposition. It is not necessary that it should be positively found."

The first State Supreme Court case, which deals with a similar issue after the 1957 Convention became Commonwealth law, is Gaggin v. Moss.<sup>75</sup> The yacht Selathia at anchor belonging to the respondents was negligently struck and sunk by the fishing vessel Madonna owned by the appellant. The trial court directed the judgment to be entered against the appellant shipowner for \$76,947 and the master of Madonna for \$24,802. By virtue of Article 6 (3) of the 1957 Convention, which was brought into force under the Navigation Amendment Act 1979 (Comth.), the master was entitled to limit his liability.

72. As to the list of countries that had ratified or acceded to it, see Register of Conventions and Other Instruments concerning International Trade Law (1973) vol. II, p. 169, United Nations.

73. (1938) 60 C.L.R. 650.

74. Ibid., p. 654. M.W. Forde, "Comments on Limitation of Liability; Fault and Privity in Marine Claims" (1984) 14 Q. Law Soc. J. 255.

75. [1983] 2 Qd. R. 486, per McPherson, J.

This relief is available even where the occurrence, which gave rise to the claim, had resulted from his actual fault or privity. The trial judge held that the appellant shipowner was not entitled to limit his liability under Article 1 (1). He was not persuaded that the casualty occurred without his actual fault or privity. The appeal brought by the appellant shipowner was unanimously dismissed.<sup>76</sup> Despite the operation of the Convention, the decision shows no change in the attitude of Australian judges as to the burden of proof. In the House of Lords case of Standard Oil Co. of New York v. Clan Line Steamers Ltd., Viscount Haldane observed:<sup>77</sup>

"It is now well settled that those who plead the section as defence (scil. s. 503 of the Merchant Shipping Act) must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privity to what occurred."

In Gates v. Gaggin and Another,<sup>78</sup> Campbell, C.J., and Connolly, J., of the Full Court of Appeal of Queensland Supreme Court adopted the proposition of Viscount Haldane and that of Dixon, J., cited above. Connolly, J., (with whose view Campbell, C.J., agreed) said:<sup>79</sup>

"The burden of proving the absence of actual fault or privity was on the appellant throughout. He cannot discharge that burden by saying in effect that he accepts that the immediate cause of the casualty was faulty navigation on the part of the master leaving at large the nature of that fault."

An important feature of the limitation decree is that it operates upon claims that rest upon the original cause of action and those that have passed into judgment. A defendant shipowner, when sued for the collision damage, is not obliged at the same proceedings to seek the statutory relief by setting up a counter-claim.<sup>80</sup> He is not precluded from instituting an independent action on a subsequent occasion to limit his liability.

76. See Gaggin v. Moss [1984] 2 Qd. R. 513.

77. [1924] A.C. 100, p. 113.

78. (1983-84) 51 A.L.R. 721.

79. Ibid., p. 729.

80. Ibid., p. 724 where the proposition of Dixon, J., in James Patrick & Co. Ltd. v. Union Steamship Co. of New Zealand Ltd. (1938) 60 C.L.R. 650, p. 673 was cited with approval.



The 1957 Convention permits a logical demarcation line to be drawn between employees and management personnel. This distinction is crucial if the master or a member is at the same time the owner, co-owner, charterer, manager or operator of the ship. By Article 6 (3), the limitation of liability will nevertheless apply where the act, neglect or default, which gives rise to the casualty, is committed by the person in his capacity as master or crew member only. The provision, though extended to all management personnel, is an enactment of a rule of interpretation attributed to Dr. Lushington in the second half of the nineteenth century. In The Obey,<sup>81</sup> he found that the master, who was also a part-owner of the ship, was not guilty of any fault which was the cause of the collision. He said that "to say that, because the master is a part-owner you can charge the other owners with blame, would be contrary to all reason and principle."<sup>82</sup> The construction arose out of section 54 of the English Merchant Shipping Amendment Act 1862 (Imp.) dealing with the limitation of liability.

It is uncertain how far by giving effect to the 1976 Convention, the Merchant Shipping Act 1979 (U.K.) will operate to further the management doctrine. Undoubtedly, this doctrine could have some application in determining the type of culpable conduct that will prevent a person from limiting his liability. Article 4<sup>83</sup> refers specifically to the nature and burden of proof to be met. The dis-entitlement arises where "it is proved that the loss resulted from the personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." Again in the 1976 Convention, the claims subject to limitation and the conduct barring limitation are dealt with under two separate Articles. The above factors lead one to infer that claimants seeking to recover compensation in excess of the limitation fund must discharge the heavy onus required in Article 4. If our reasoning is correct, then this is another material difference

81. (1866) 12 Jur. (N.S.) 817.

82. Ibid., p. 818.

83. Schedule 4 Part I.

between the laws of Australia<sup>84</sup> and the United Kingdom. It means that the principles relating to proof by shipowners, charterers or certain other persons that the loss or damage occurred without their actual fault or privity is no longer part of the United Kingdom's law.<sup>85</sup>

#### 4. Extent of Vicarious Liability

On the presumption that the burden of proof incumbent on shipowners has been discharged to the court's satisfaction, there still remains to be worked out the quantum of damages recoverable under the doctrine of respondeat superior. It will be recalled that the Responsibility of Shipowners Act 1734 (Imp.) was probably the first of its kind to introduce a formula for limiting shipowners' liability. Thus where the loss or damage occurred without the "privity and knowledge" of shipowners in certain situations, the limitation of liability would apply. They were not answerable beyond "the value of the ship or vessel, with all her appurtenances and the full amount of the freight due or to grow due for and during the voyage"<sup>86</sup> concerned. With minor exceptions, the formula was virtually retained for over twelve decades by successive legislation.<sup>87</sup> Between the first settlement of New South Wales in 1788 and the passing of the Navigation Amendment Act 1979 (Comth.), Imperial legislation had operated as part of Australian law.

Two difficulties were presented by the formula. As the "value of the ship" was nowhere defined in any of the Acts (Imp.), claimants were placed in a disadvantaged position. To promote certainty, all three judges of the Court of King's Bench held in Wilson v. Dickson,<sup>88</sup> decided in 1818, that the expression meant "the existing value at the time when the loss takes place." The mode of ascertaining the value was still not a clear-cut matter. If the ship did

84. See Article 1 (1) of the 1957 Convention which, apart from Article 1 (1) (c), has been given the force of law by Navigation Act 1912-73 (Comth.), s. 333, as amended.

85. By reference to Merchant Shipping Act 1894 (Imp.), ss. 502 and 503 (repealed); see also Merchant Shipping Act 1979 (U.K.), ss. 17 and 18 and Schedule 7 Part I.

86. 7 Geo. II, c. 15, s. 1; 26 Geo. III, c. 86, s. 1; 53 Geo. III, c. 159, s. 1.

87. See Merchant Shipping Act 1854 (Imp.), ss. 504 and 505.

88. 106 E.R. 268, p. 273.

ultimately arrive, by assessing her value at the destination, it was possible to find the value at the time of the loss. In other cases, when the exact time of the loss or casualty was uncertain, claimants would present a prima-facie case as regards her value at the time of sailing.<sup>89</sup> Shipowners, as defendants, had the onus of proving that since the time in question the ship had depreciated in value. A dispute arose in The "Dundee"<sup>90</sup> involving the liability of the owners of a Greenland fishing vessel for damage done to another British ship. The former was equipped for a whaling voyage with fishing stores. Section 1 of the Responsibility of Shipowners Act 1813 (Imp.) mentioned only the ship and freight. The suit was commenced in the Court of Admiralty by an arrest of the vessel, tackle, apparel and furniture only. Lord Stowell nevertheless held that, since the fishing stores were part of the ship, they were appurtenances within the meaning of the Act.

One flaw in the statutory provisions for ascertaining the liability limit is obvious. Shipowners could easily arrange with charterers and cargo shippers for the freight to be paid any time before or after the voyage. It would appear that hire for the charter of a ship based on time periods, rather than on individual voyages, would fall outside the formula. The courts played a significant role<sup>91</sup> in protecting the interests of claimants by preventing shipowners from fraudulently reducing the limitation fund. Thus in Wilson v. Dickson,<sup>92</sup> the common law judges held that, in calculating the value of "freight due or to grow due", money actually paid in advance was to be included. In Cannan and Others v. Meaburn and Others,<sup>93</sup> an action was brought against a shipowner for the loss of goods carried. The completion of the voyage was prevented

89. See Cannan and Others v. Meaburn and Others (1824) 1 Bing. 465, infra.

90. (1823) 166 E.R. 39.

91. If the true amount representing the value of the ship, appurtenances and freight was not paid into court, further payment would be required; moreover, the court was empowered to take measures to ascertain the value of the ship, etc.: Responsibility of Shipowners Act 1813 (Imp.), ss. 8 and 10.

92. (1818) 106 E.R. 268.

93. (1824) 1 Bing. 465.

by the tortious sale of the ship by her master. Lord Gifford, C.J., held that the extent of the shipowners' liability would include the amount of freight she would have earned had she completed her voyage, and not the amount of freight calculated at the commencement of her voyage. The recurring problems, which related to the meaning of freight, were largely due to the furtive and devious dealings of shipowners. They led to the inclusion of section 505 in the Merchant Shipping Act 1854 (Imp.). This provision comprehensively defined freight to include the value of the carriage of any goods or merchandise belonging to the shipowner, passage money and also the hire due or to grow due under any contract. The definition seems wide enough to embrace virtually all forms of a ship's earnings. Expressly excluded from it was hire for time charter which would not begin until the expiration of six months after the ship's loss or damage.

It is interesting to note that a different approach to the concept of limiting shipowners' liability was introduced by the 1854 Act (Imp.). The pre-existing mode of computing liability was retained to apply to claims for loss or damage caused to goods carried and to any ship by reason of improper navigation, and for injury or loss of life caused to any person on board any ship. However, the new formula was used to limit liability for personal injury or loss of life caused to any passenger.<sup>94</sup> This method of computing compensation based on the product of fifteen pounds and the ship's registered tonnage has distinct advantages. It relieves the passenger or his personal representative of some of the problems faced by claimants previously.

Owing to the ease and certainty with which shipowners' maximum liability could be worked out, the new method was alone adopted by the Merchant Shipping Amendment Act 1862 (Imp.). Where personal injury or loss of life was caused to any person carried in a ship or, by reason of improper navigation of such ship, to any person carried in another ship, the aggregate amount recoverable was limited to fifteen pounds per ton of the ship's registered tonnage. In the case of loss of or damage to goods carried, it was limited to eight pounds per ton of the ship's registered tonnage.<sup>95</sup> With regard to steamships, the

94. Merchant Shipping Act 1854, proviso to s. 504.

95. See s. 54.

gross tonnage was taken as the multiplying factor without deduction on account of the engine room. It is highly significant that the legislators of the Merchant Shipping Acts<sup>96</sup> and the formulators of international maritime Conventions<sup>97</sup> have endorsed this method of computing liability. The giving of effect to the 1957 Convention by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 and the Navigation Amendment Act 1979 (Comth.) ensured uniformity in the method of computing damages under the laws of the two countries. We shall, in due course, consider whether any difference in the amount of limitation fund existed.

Under the 1957 Convention, the net tonnage of the ship is to be taken as the multiplying factor. With regard to steamships or mechanically propelled ships, for the purpose of calculating the net tonnage there must be deducted from the gross tonnage the addition of any engine room space.<sup>98</sup> By section 97 of the Navigation Amendment Act 1979 (Comth.), effect has been given to the International Convention on Tonnage Measurement of Ships 1969.<sup>99</sup>

One obvious shortcoming of the 1957 Convention is the lack of provisions to cover collisions involving a tug and/or her tow on the one hand and another ship on the other hand. If claims are brought by the owners of a third vessel, doubts can arise as to whether, for the purpose of the limitation fund, the tonnage of the tug alone or the combined tonnage of both is to be taken. As regards the pre-Convention position, Australian law on the subject was based on Imperial legislation and English case authorities.

96. Merchant Shipping Act 1894 (Imp.), s. 503 (repealed); Merchant Shipping (Liability of Shipowners and Others) Act 1958 (U.K.), s. 1 (1) (repealed).

97. International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Article 3 rule (1); Convention on Limitation of Liability for Maritime Claims 1976, Article 6 rule 1.

98. Article 3 rule 7.

99. This ensures that the method used in Australia for measuring a ship's gross tonnage is similar to that applied elsewhere. Moreover, the Merchant Shipping Act 1979 (Imp.), Schedule 4 Part II, rule 5 (2) provides for a ship's gross tonnage to be calculated, so far as practicable, according to the regulations in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969.

In The Quickstep<sup>1</sup>, the tug failed to carry a second masthead light to indicate that it was towing. Consequently, the steamer Charles Dickens came into collision with the hopper barge and sustained extensive damage. The hopper barge carried a proper light and had two men on board. It was admitted that there was no interference by those on board the hopper barge with the navigation of the tug. The barge owners were held to be exempt from liability for the negligence of the crew of the tug. Whether the crew of the tug were to be regarded as the servants of the owner of the vessel in tow was dependent upon the circumstances in each case. No general rule was laid down as to the liability of a vessel in tow for a collision between her and another vessel due to the negligent navigation of those on board the tug.

The Harlow<sup>2</sup> is a classic case where the claim of the owners of a third vessel against the owners of a tug and her tows was limited. The Harlow and the barges in her tow, belonging to the same owner and being navigated by different persons, were solely to blame for the damage caused by collision to the steamship Dalton. In the limitation action, the owners of the Dalton objected to a decree being granted limiting the plaintiffs' liability under section 503 to an amount to be measured by the tonnage of the Harlow alone. The issue before the court was the extent to which the plaintiffs could limit their liability. It was established that the Harlow and all the barges were improperly navigated. The findings, however, showed that the damage to the Dalton was caused by the Harlow and two of the barges in her tow, Silver and Solutu. Sir Henry Duke held that the plaintiffs "are entitled to limit their liability...to an aggregate amount made up of £8 per ton of the several tonnages of the Harlow, the dumb barge Silver and the dumb barge Solutu."<sup>3</sup> He appears to have adopted the concept of immediate or effective cause as the criterion for determining the liability limit of owners of the tug and a number of barges in her tow.

A similar rule was applied in the Tasmanian case of Williams Holman & Sons Pty. Ltd. v. The Marine Board of Launceston.<sup>4</sup> The tug "Wybia" and one of the four lighters in tow - all belonging to the defendant - negligently collided with the plaintiff's steamer "Wareatea".

1. (1890) 15 P.D. 196.

2. [1922] P. 175.

3. Ibid., p. 187.

4. (1929) 24 Tas. L.R. 64.

Here none of the lighters were manned by any crew on board. Inevitably, the master of the "Wybia", the defendant's servant, was deemed responsible for the navigation of both the tug and lighter concerned. There is some authority for the proposition that, in such circumstances, where a tug is negligently navigated and collision damage is caused to a third vessel by the tug and her tow, the tug and her tow will be treated as a single unit.<sup>5</sup> Clark, J., held that, under section 503, the plaintiff was entitled to recover up to a maximum amount based on the combined tonnage of the "Wybia" and the lighter.<sup>6</sup>

We shall look at the situation where the barge is not to blame. In the English Court of Appeal case of The "Bramley Moore",<sup>7</sup> a collision occurred between the m.v. Egret and the Millet, one of the two dumb barges in the tow of the tug Bramley Moore. Both the Egret and the tug were equally to blame for the collision. The tug and the barge belonged to different owners. On behalf of the appellant owners of the Egret, it was forcefully argued that it was the negligence of those on board the tug that constituted the improper navigation of the Millet. An ingenious argument was raised regarding section 503 (1) (d) (ii). It was contended that, once it was held that the servants of the respondent owners of the tug improperly navigated the barge, the latter could not limit their liability. In rejecting the arguments,

5. The Ran; The Graygarth [1922] P. 80, pp. 86-87. Lord Denning doubted the correctness of the decision: The "Bramley" Moore [1963] 2 Lloyd's Rep. 429, p. 436.

6. In McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd. (1945) 70 C.L.R. 175, a tug with a lighter lashed to her starboard side negligently collided with, and occasioned damage to, a third vessel. The tug was chartered to the plaintiff in the limitation suit, and at the material time was under the control of his employees. The plaintiff was also the hirer of the lighter. It was held by the Full Court of the Supreme Court of New South Wales that the plaintiff was entitled to limit his liability under s. 503 but only by reference to the tonnage of both the tug and the lighter. The decision was upheld by the High Court of Australia.

7. [1963] 2 Lloyd's Rep. 429. For differences in approach between English and American laws, see L.J. Kovats, "Tug and Tow - Limitation of Liability - The Flotilla Issue" [1977] 1 L.M.C.L.Q. 19.

Lord Denning, M.R., used the "effective cause" criterion when he said:<sup>8</sup>

"And in a case where those on the tug are negligent, and those on the barge are not, the cause of the damage is in truth the improper navigation of the tug, not the improper navigation of the barge. It is the tug which is the cause of all the trouble."

In Lord Denning's view, the result of the amendment of section 503 (1) (d) by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (U.K.) was to dispel the "logical difficulty."<sup>9</sup> Thus where the tow collides with another vessel due to the negligence of those on board the tug, then the damage is caused through an "act or omission of an person on board the tug" within the provision. The English Court of Appeal unanimously upheld the trial court decision that the respondents' liability was limited according to the tonnage of his tug alone. His Lordship reiterated that the limitation of liability "is a rule of public policy which has its origin in history and its justification in convenience."<sup>10</sup> Obviously by construing the provision in a broad sense, effect is given to the object of the 1957 Convention which extends the limitation of liability.

Suppose that the tug and the tow belong to different owners. If, as a result of the combined negligence of the master of the tug and the crew on the lighter, the latter comes into collision with a third vessel, the owners of the tug and the lighter can limit their liability according to the tonnage of their particular vessel. His Lordship is of the view that where the damaged vessel makes claims against both, their liability is limited to the combined tonnage of the two vessels. Indeed, he went so far as to say that the 1958 Act (U.K.), which amended section 503 of the 1894 Act (Imp.), "makes it clear that the previous practice was right."<sup>11</sup> He meant that the 1958 amendment had made no change in English maritime law so far as the rules for limiting the liability of tug-owners and barge-owners

8. Ibid., p. 436.

9. Ibid., p. 437. Unfortunately, there is nothing in the Convention on Limitation of Liability for Maritime Claims 1976 to deal with the matter.

10. Ibid., p. 437.

11. Ibid., p. 437. It is reasonable to presume that the law laid down prior to the passing of the Merchant Shipping Act 1979 (U.K.) would continue to apply.



were concerned. Moreover, section 503 of the 1894 Act (Imp.), as amended, retained the word "ship" which had been construed widely to include a tug, dumb barge and lighter.

In directly incorporating the 1957 Convention as part of the Navigation Amendment Act 1979 (Comth.), the Commonwealth Parliament was faced with one problem. This was the rather narrow scope of protection available in many instances. Article 1 (1), which provides relief, begins with the words: "The owner of a sea-going ship may limit his liability in accordance with Article 3...." The expression "sea-going ship" is not defined in the 1957 Convention. By section 334 (1) (a) of the Navigation Act 1912-73 (Comth.), the expression was deemed to include a ship which was engaged in trade or commerce with other countries or among the States or with the Territories, and a ship under construction which was intended to be used for such pursuits. For the purpose of protection under the Convention, the meaning given by the Commonwealth legislation to "sea-going ship"<sup>12</sup> was more restrictive than that given by English law to "ship". The term "sea-going ship" was not synonymous with the word "ship" as used in section 6 (1) of the Navigation Act 1912-73 (Comth.). Obviously many types of vessels are not "sea-going ships" and would not come within the meaning of section 334 (1) (a). Non-seagoing ships include boats, lighters, barges, river-going craft, fishing vessels, harbour-going launches and some tugs. If the reasoning is correct, the owners of such vessels - whether self-propelled or in the course of being towed - would be unable to limit their liability.

Fortunately, the problem, which would otherwise be a devastating blow for owners and operators of non-seagoing vessels, has been rectified by section 93 of the Navigation Amendment Act 1980 (Comth.). It reads:

"Every ship that is not a ship referred to in [section] 2 (1) (a), (b), (c) or (d) and is not a sea-going ship shall, for the purpose of this Division and the applied provisions of the Convention, be treated as if it were a sea-going ship."<sup>13</sup>

12. Registration, however, is not a prerequisite for entitlement to the statutory protection.

13. For s. 2 (1) as amended, see Navigation Amendment Act 1980 (Comth.), s. 3.

The amendment seems wide enough to cover virtually every type of non-seagoing ship, including a tug, barge, inland waterways vessel, and pleasure craft. Unlimited liability, however, may nevertheless arise in a collision involving the tow and a third ship. A commonplace example is where an object, viz. a life buoy, beacon or pontoon, in the tow of a ship, collides with and damages a third ship. The tug owner will probably be answerable to the full extent of the damage if it is proved to have been caused by the failure of his servant, tending the object in tow, to give proper instructions to the tug's master. The reason for the unlimited liability is that the object that wrongfully causes the damage is not a ship within the meaning of section 93 of the Navigation Amendment Act 1980 (Comth.).

By giving effect to the Convention on Limitation of Liability for Maritime Claims 1976, the United Kingdom Parliament has enlarged the statutory protection in an unprecedented way. Unlike the position in Australia, the 1976 Convention confers the benefit of limiting liability under two different articles. Apart from the exceptions,<sup>14</sup> Article 2 provides for claims subject to the limitation, whatever the basis of liability. Apparently, no distinction is made between the acts, neglects or omissions of a shipowner and those of his servant or employee. The protection avails where a plaintiff's claim comes within Article 2 (1) (a) to (f) of Schedule 4 Part 1 of the Merchant Shipping Act 1979 (U.K.). Subject to Article 2, Article 1 extends the statutory protection to any person connected with salvage work, and also to any person who is the owner, charterer, manager or operator of a seagoing ship. This is defined by Schedule 4 Part II, paragraph 2, of the 1979 Act (U.K.) to include any ship "whether seagoing or not."

#### 5. Monetary Aspects

We come now to the shipowner's liability under the doctrine of respondeat superior in monetary terms. The language of Article 3 (1)

14. For claims excluded from limitation, see Merchant Shipping Act 1979 (U.K.), Schedule 4 Part I, Articles 3 and 4, and Part II, para. 4.

of the 1957 Convention is clear as to the amounts to which the ship-owner may limit his liability. For property claims, the aggregate amount is limited to 1,000 francs, and for personal claims the aggregate amount is limited to 3,100 francs, per ton of the ship's tonnage, respectively. The latter aggregate amount also applies where the occurrence gives rise to both property and personal claims. In such a case, however, the first portion comprising twenty-one out of thirty-one parts (21/31) shall be appropriated to personal claims, while the second portion comprising ten out of thirty-one parts (10/31) shall be appropriated to property claims. There is a clear proviso in Article 3 (1) (c) that where the first portion is inadequate to pay personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims to be paid out of the second portion.

The wording of the repealed section 503 (1) of the 1894 Act (Imp.), as amended by section 2 (1) of the 1958 Act (U.K.), was insufficiently clear as to how, in the event of personal injury and property damage being sustained, the aggregate amount was to be apportioned. To maintain international uniformity and consistency in this aspect of the law, section 503 (1) should be construed by reference to the official text of the Convention.<sup>15</sup>

Unlike the pre-1979 United Kingdom's law, Commonwealth legislation does not provide for direct conversion into Australian currency of the francs as used in the Convention. To safeguard the rights of claimants, as victims of marine casualties, against devaluation and other international monetary problems affecting Australian currency, well-coordinated measures have been introduced by the Commonwealth Parliament. By paragraph 5 (1) of Navigation (Limitation of Shipowners' Liability) Regulations 1981 (Comth.), fifteen francs are "to equal one special drawing right" within the meaning of the International Monetary Agreements Act 1947-1973 (Comth.).<sup>16</sup> The special drawing rights are to be converted into Australian currency at the

15. By Article 16, the English and French texts of the Convention are equally authentic.

16. See s. 3 (1).

official exchange rate on the day on which the limitation fund is constituted by the court's order under the amended section 335 (1) of the Navigation Act 1912-73 (Comth.).<sup>17</sup> Under the Regulations (Comth.) the Reserve Bank of Australia is empowered to determine the official exchange rate prevailing on the day in question. The Australian approach is equitable as it seeks to ensure that, despite any fall in the exchange value of the Australian dollar, claimants will be paid an equivalent amount in Australian currency. Further explanation may help. The special drawing rights are largely determined by a basket of four or five major currencies of the world, including the U.S. dollar. A fall in the exchange value of the Australian dollar will result in the claimant recovering a larger amount as the equivalent.

TABLE SHOWING THE RELATIONSHIP BETWEEN S.D.R. AND AUSTRALIAN CURRENCY

Exchange Rate of Australian dollars for Special Drawing Right (S.D.R.) at different dates	(Say) ship's tonnage - 300 tons. Rate for property damage - 1,000 francs per ton. Number of S.D.R.'s - $300,000 \div 15$ <sup>18</sup> = 20,000
	Amounts payable in Australian currency.
Jan. 2, 1985 - \$A 1.1932 for 1 S.D.R. <sup>19</sup>	\$A 23,864.00
Dec. 31, 1984 - \$A 1.1841 for 1 S.D.R.	\$A 23,682.00
Dec. 31, 1983 - \$A 1.1731 for 1 S.D.R.	\$A 23,462.00
When value of Australian currency falls, claimant is compensated with a larger amount.	

The Commonwealth Parliament is consistent in its "currency-conversion" policy. Apart from the date for determining the value

17. Navigation (Limitation of Shipowners' Liability) Regulations 1981, para. 5 (2) (c).

18. Ibid., para. 5 (1) (a) provides that fifteen francs are equal to one special drawing right.

19. Information regarding the exchange rate of Australian dollars for the special drawing right was obtained from Mr. Phil. Graeme, an officer of Reserve Bank of Australia, Hobart. Cf. L. Bristow, "Gold franc-Replacement of Unit of Account" [1978] 1 L.M.C.L.Q. 31.

of the special drawing rights, the same method is applied in computing the liability of a shipowner under Parts II and III of the Protection of the Sea (Civil Liability) Act 1981 (Comth.). By paragraph 3 (1), fifteen francs are equal to one special drawing right, and special drawing rights are to be converted into Australian currency.<sup>20</sup> It may be recalled that the Minister is authorised to incur expenses or other liability under sections 8, 9 and 10 of the Protection of the Sea (Powers of Intervention) Act 1981 (Comth.). Where an incident did not occur as a result of actual fault or privity of the shipowner, the amounts prescribed for the purposes of section 20 (3) (a) and (b)<sup>21</sup> are the equivalents of 133 special drawing rights and fourteen million special drawing rights, respectively.<sup>22</sup> In each case, the amount in Australian currency is calculated according to the value of the special drawing rights applicable on the first day of the incident and to the method of valuation applied by the International Monetary Fund.<sup>23</sup>

The Navigation (Limitation of Shipowners' Liability) Regulations 1981 (Comth.) and the Protection of the Sea (Civil Liability) Regulations 1983 (Comth.) provide the same method for converting francs into Australian currency. The advantage of this method is that it allows for fluctuations in the exchange rate of Australian currency, without diminishing the rights of claimants in recovering equivalent amounts.

Until the Merchant Shipping Act 1979 (U.K.) was passed giving effect to the 1976 Convention,<sup>24</sup> the United Kingdom Parliament had adopted a rigid sterling-oriented approach. Section 1 (1) of the 1958 Act (U.K.) provided for the amounts of fifteen pounds and eight pounds as the equivalent of 3,100 francs and 1,000 francs, respectively. Despite the fall in the exchange value of the sterling and its

20. Protection of the Sea (Civil Liability) Regulations 1983, para. 11 (1) and (2).

21. Protection of the Sea (Civil Liability) Act 1981 (Comth.).

22. Protection of the Sea (Civil Liability) Regulations 1983, para. 11 (1) and (2).

23. Ibid., para. 11 (3).

24. See Schedule 4 Part II, para. 7 (1) and (2).

devaluations, only periodic measures had been taken to adjust the amount of sterling payable to compensate for its depreciation.

Some of the problems encountered by claimants under English law are reflected in The "Abadesa".<sup>25</sup> The plaintiff owners of the tanker "Abadesa" sought to limit their liability for damage caused by collision on 25th February, 1963, to the tanker Miraflores. By the Merchant Shipping (Limitation of Liability) (Sterling Equivalent) Order 1958 the sterling equivalent of £23 13s. 9 27/32 d. was declared for 1,000 francs. It was not until about nine years later that the equivalent of £27 12 s. 9½ d. was substituted by the 1967 Order for 1,000 francs. Fortunately for the defendant owners of Miraflores, although the writ issued by the plaintiffs was dated 8th February, 1966, it was only on 21st February, 1968, that the order of the Admiralty Registrar was made. As the limitation fund was computed according to the conversion rate specified in the 1967 Order and not, as the plaintiffs contended, according to that in the 1958 Order, they appealed against the decision. The appeal was dismissed. It is submitted that, under the pre-fixed conversion-rate system, the argument raised by the plaintiffs was rational and forceful - namely, the conversion rate existing on the date of collision or the issue of the writ should apply. In view of the frequent fluctuations in the sterling exchange value, the 1958 Act (U.K.) should have been amended to bring the conversion rate into line with Article 3 (6) of the 1957 Convention.

If Article 3 (6) had been given effect fully as the United Kingdom's law, the plaintiffs in The "Abadesa" would have been liable to pay a larger amount calculated according to the conversion rate existing on 21st February, 1968, and not on 24th November, 1967.<sup>26</sup>

25. [1968] 1 Lloyd's Rep. 493. As to competence of English courts to give judgments in currencies other than sterling, see D.H. Hene, "Judgments in Foreign Currencies" [1975] 1 L.M.C.L.Q. 19, pp. 23-24. As to admiralty practice and claims in tort, see S.L. Isaacs, "Foreign Currency Claims and the English Courts" [1977] 3 L.M.C.L.Q. 356, pp. 363-364.

26. The reason is that the plaintiffs had failed to constitute a limitation fund or provide any guarantee prior to 21st February, 1968. As to the current position, see Merchant Shipping Act 1979 (U.K.), Schedule 4 Part I, Article 8 and Part II, para. 7 (1).

Another flaw in the pre-1979 United Kingdom's approach is evident. The long intervals, which elapsed between the currency equivalent orders, were bound to produce unjust results in many instances. A limitation fund constituted according to the same conversion rate in force for the past (say) nine years would be much less than one constituted soon after a new currency equivalent order came into effect.

To alleviate financial hardships inflicted on the plaintiffs in limitation suits, an important provision was made in section 1 (4) of the 1958 Act (U.K.). It read:

"Where money has been paid into any court...in respect of any liability to which a limit is set as aforesaid, the ascertainment of that limit shall not be affected by a subsequent variation of the amounts specified under subsection (3)...unless the amount paid or consigned was less than that limit as ascertained in accordance with the order then in force under that subsection."

According to Lord Eveleigh,<sup>27</sup> the primary object of section 1 (4) was to harmonise the new limitation basis of assessment with rules of court permitting a party to pay money into court. Apart from relieving a shipowner of the anxiety of anticipating a new exchange rate which might be prescribed before the limitation decree, he would be able to ascertain in advance his ultimate liability. The English Court of Appeal held that the purpose of the provision was to give a shipowner, who paid money into court, a measure of protection by freezing his limited liability. Thus by paying the amount calculated according to the conversion rate prescribed by the existing currency equivalent order, he was protected against any fall in the value of sterling in relation to gold francs.

It is submitted that under Australian maritime law the same protection is available. At or soon after the commencement of the limitation suit, a plaintiff can pay into court an amount of money representing his ultimate liability. It is calculated based on the

27. Polish Steam Ship Co. v. Atlantic Maritime Co. and Others (The Garden City) [1984] 3 All E.R. 59, p. 64.

official exchange rate "on the date on which the shipowner shall have constituted the limitation fund, made the payment or given the guarantee..." as provided by Article 3 (6) of the 1957 Convention. If at the date of the grant of the limitation decree there is a fall in the value of Australian currency vis-a-vis the special drawing rights, the plaintiff should not be required to pay more in terms of Australian dollars. Section 5 (1) of the Navigation (Limitation of Shipowners' Liability) Regulations 1981 (Comth.) provides that the official exchange rate shall be determined by the Reserve Bank of Australia on the day on which the limitation fund is constituted by an order of the court under section 335 (1).<sup>28</sup> It is submitted that, since the court has discretion under this provision to make "such order or orders as it thinks fit", court permission could be obtained to pay in an "acceptable" pre-decree amount.

One highly relevant issue is whether shipowners are liable to pay interest in addition to the limitation fund. With the exception of section 13 of the Responsibility of Shipowners Act 1813 (Imp.), neither the Merchant Shipping Acts (Imp.) nor the 1957 Convention<sup>29</sup> makes provision for its payment. It appears that, in the early days, the Court of Admiralty had acted on the principle of civil law which differed from the rule of common law. According to the former, interest was always payable to the obligee when payment due was not made on time. Under the old law, the practice of the Court of Admiralty was to limit the shipowners' liability to the value of the ship at the time of the loss and the freight she would have earned if she was laden with cargo. The interest on the ship was based on the estimated value of the ship at the time when she would probably have arrived at the destination. The reason was that, up to the probable date of arrival, freight less the expenses in earning it was calculated to make up for interest on the ship's estimated value. Where the ship was wrongfully sunk with no cargo on her, interest on her

28. As amended by Navigation Amendment Act 1979 (Comth.), s. 65 (1).

29. Including the Convention on Limitation of Liability for Maritime Claims 1976.



estimated value was allowed from the date of collision. In Straker v. Hartland,<sup>30</sup> Vice-Chancellor Wood observed that the "Court of Admiralty says very truly, that interest is not given by way of indemnification for loss, but because the loss was not paid for at the proper time." Sir R. Phillimore justified the award on the following grounds:<sup>31</sup>

"Indeed the equity of the thing is the other way, for to refuse this interest would be to diminish still further the natural right of the sufferer to full compensation for the injury which he had sustained."

Under modern legislation on limitation of liability, the old practice of allowing interest from the date of collision has been followed. Courts administering the Merchant Shipping Acts (Imp.) have consistently imposed interest on the limited amount of liability of ship-owners. The rule applies to loss or damage caused to any ship, goods carried or other property, as well as to personal injury and loss of life. In The "River Loddon",<sup>32</sup> decided by the High Court of Australia in 1955, Taylor, J., felt bound to apply the four per cent English rate. He was of the view that uniformity of practice should be followed in order to provide a fair return over a long period.<sup>33</sup>

In giving statutory effect to the 1957 Convention, the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (U.K.) had not altered the basis on which interest was awarded. It has been a judicial concept that interest is given for loss incurred by a sufferer who is kept out of his money. The loss is of a different description from the physical destruction of the goods carried or of the ship due to collision.<sup>34</sup> In The "Abadesa",<sup>35</sup> the liability was limited under section 503, as amended by the 1958 Act (U.K.). It is interesting to

30. (1865) 11 L.T. (N.S.) 622, 623. He ordered payment of 4% interest on the amount of damages from the date of collision. At the time of the loss, the ship was in ballast.

31 The Northumbria (1870) 21 L.T. (N.S.) 681, p. 683.

32. Commonwealth of Australia v. Asiatic Steam Navigation Co. Ltd. and Others [1955] 1 Lloyd's Rep. 503.

33. On appeal, Taylor J.'s judgment was affirmed by five Judges of the High Court: (1955-56) 96 C.L.R. 397.

34. 5 N.R. 164 (Note).

35. [1968] 1 Lloyd's Rep. 493.

note that Karminski, J., allowed the interest rate of four per cent, which had prevailed for over a century, to be raised to five and a half per cent.

The Case of Gaggin v. Moss<sup>36</sup> indicates a recent Australian approach to the award of interest. The defendant shipowner failed to obtain a decree for the limitation of his liability under section 333 of the Navigation Act 1912-73 (Comth.), as amended, for the wrongful sinking of the plaintiffs' yacht. Judicial consistency was maintained when cognizance was taken of the prevailing commercial rate applied in The "Abadesa" and other recent English decisions. However, due probably to the different conditions prevailing in the economy and money market in Australia, a more generous figure was allowed. In delivering the Supreme Court of Queensland judgment, McPherson, J., said:<sup>37</sup>

"...I will award interest at the rate of 10% p.a. for two years. This was the rate adopted in a recent collision case in Admiralty in this Court: Markwell v. Markwell Fisheries Pty. Ltd. (No. 1937 of 1978: unreported)."

He followed the English practice of awarding interest for the period between the date of collision and the judgment. One aspect of the judgment is unsatisfactory. Unlike the loss of personal effects, expenses incurred by the plaintiffs in travelling and accommodation following the loss of their yacht were allowed without interest. It is submitted that the distinction between the two types of loss is illogical.

The recent decision in The Garden City<sup>38</sup> highlights the construction English judges put on the 1957 Convention with regard to interest in the hands of the court. On 27th April, 1978, the plaintiff

36. The trial court decision, as reported in [1983] 2 Qd. R. 486, that the defendant shipowner was not entitled to limit his liability under the Navigation Act 1912-73 (Comth.), s. 333, as amended, was unanimously upheld: [1984] 2 Qd. R. 515.

37. [1983] 2 Qd. R. 486, p. 500; cf. Practice Note No. 25 [1982] 2 N.S.W.L.R. 42.

38. [1984] 3 All E.R. 59.

shipowners commenced an action under section 504 of the 1894 Act (Imp.). It was for relief and to determine the amount of their liability for the loss of the defendants' vessel and most of the cargo on board. The loss occurred in 1976 as a result of a collision, for which the plaintiff shipowners were held partly to blame. On 28th April, 1978, the plaintiffs paid into Court two sums of money, *viz.* £395, 341 and £297,559. The former amount represented the limitation figure computed according to section 503, as amended by the 1958 Act (U.K.), and the latter represented simple interest on the limitation amount from the date of collision until 30th April, 1978. The limitation fund comprising the two sums was invested at the plaintiffs' request. By November, 1982, the interest earned amounted to £534,904. The plaintiffs appealed against the order of the Admiralty Court judge that all the interest accrued on the limitation fund be paid to the defendants. In reversing the decision, a strong English Court of Appeal laid down a number of important rules. In a limitation suit, the plaintiff is entitled to direct that the limitation figure paid into court be invested so as to maximise the amount, and to any interest accrued on the payment in. Everleigh, L.J., was somehow constrained to construe section 1 (4) of the 1958 Act (U.K.) in the light of Article 3 (6) of the 1957 Convention.<sup>39</sup> The fund is deemed to be constituted within the meaning of the Convention on the date of the payment into Court. Since the Convention does not stipulate that the fund constituted must contain interest, their Lordships held that there was no obligation on the plaintiff to pay in a sum of money representing interest in order to limit his liability. The defendants were only entitled to simple interest on the limitation figure from the date of collision until the date of the limitation decree. Moreover, an English court exercising admiralty jurisdiction has no power to award compound interest. The remainder of the funds in court was held to belong to the plaintiffs. In keeping with the practice of the English Commercial Court, interest on the limitation figure was raised to eight and a quarter per cent.

Except for the lower interest rate awarded, it is reasonable to presume that an Australian court seized of a case with similar facts will follow their Lordships' reasoning.

39. *Ibid.*, p. 67.

## 6. Contracting Out

There is nothing in the 1957 Convention or Navigation Act 1912-73 (Comth.) that prohibits a shipowner or carrier from contracting out of the benefits of the limitation of liability. The position in Australia has, therefore, remained unchanged. In the absence of Australian cases, English authorities are analysed in order to ascertain the ways in which the statutory protection may be excluded.

In the House of Lords case of The "Satanita",<sup>40</sup> the owners of two yachts entered for a race, each owner undertaking to observe the club rules. The rules rendered any yacht owner acting in breach of the same liable for "all damages arising therefrom." Through improper navigation, but without actual fault or privity of her owner, one of the yachts contravened a sailing rule. She ran into and sank the other yacht. In affirming the Court of Appeal decision, their Lordships construed the words "all damages" as excluding the operation of section 54 of the Merchant Shipping Amendment Act 1862 (Imp.). The entire decision was based on contractual considerations alone. Lord Herschell's clear reasoning in support of his judgment is this. The club sailing rules created, as between the two yacht-owners, a contractual liability which is distinct from the liability arising at common law, i.e. under the law of tort. Accordingly, section 54 which applied to tortious liability was inapplicable to damages flowing from a breach of contract. Lord Halsbury, L.C., attributed to the words "all damages" the literal meaning of excluding a person from the benefit of limiting his liability under the Merchant Shipping Act 1894 (Imp.) for disobeying the sailing rules.

We shall consider, and distinguish between, the effects of the two forms of contracting out, as propounded by their Lordships, namely, the "contractual obligation" method and the "exclusion" method.

Exclusion clauses are often incorporated in charterparties and bill of lading contracts. Since the same principles would apply in

40. [1897] A.C. 59.

relation to section 503,<sup>41</sup> case authorities dealing with section 502 are examined. In the Virginia Carolina Chemical Co. v. Norfolk and North American Shipping Co.,<sup>42</sup> a bill of lading clause was relied on as excluding section 502. It read:

"The shipowners and/or charterers are not responsible for any...damage to the goods...occasioned by any of the following causes, viz...fire on board...or by unseaworthiness of the ship at the commencement...of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any other cause whatever."

Buckley, L.J., held that the clause was divided into two parts. According to him, the first part expressed this meaning, viz. "If my ship is seaworthy, my contract is that I shall not be liable for fire on board...and that exemption from liability is to apply not only in cases mentioned in s. 502 of the statute but in any case whatever."<sup>43</sup> This part - it is submitted - is in line with the "exclusion" method. The second part was construed as having this meaning, viz. "I will be liable for unseaworthiness if I have not taken all reasonable means to provide against unseaworthiness."<sup>44</sup> As it contained an affirmative undertaking, it is consistent with the "contractual obligation" concept. The Court of Appeal held that section 502 was impliedly excluded by the terms of the bill of lading. It is submitted that the real reason was that the contractual undertaking embodied in the clause was not subject to the section.

In Ingram & Royle, Ltd. v. Services Maritimes Du Treport, Ltd.,<sup>45</sup> the plaintiffs claimed damages for the goods lost as a result of explosions and fire on board. Their argument based on the approach in the Virginia case failed. The clause in question not only contained different words but had no concluding part which gave rise to a contractual duty. Moreover, in seeking to establish that the defendants had contracted out of the statutory protection, the plaintiffs were

41. Substituted by Merchant Shipping Act 1979 (U.K.), s. 17; see Navigation Act 1912-73 (Comth.), s. 333, as amended. S. 502, substituted by Merchant Shipping Act 1979 (U.K.), s. 18; see Navigation Act 1912-73 (Comth.), s. 338, as amended.

42. [1912] 1 K.B. 229.

43. Ibid., p. 240.

44. Ibid., p. 240.

45. [1914] 1 K.B. 541.

unable to rely on the "exclusion" method. The decision in no way weakened the reasoning and construction applied in the Virginia case.

Towage agreements constitute another area where the methods of contracting out are vital in determining the tow-owners' liability. In The "Kirknes",<sup>46</sup> while towing the Kirknes, the tug Hillman collided with her and sank with the loss of four of her crew members. The towage contract was based on the United Kingdom Standard Towage Conditions, which were commonly incorporated in towage contracts made in Australia. The plaintiffs, as tow-owners and hirers of the Hillman, admitted liability but sought to limit their liability under section 503 of the 1894 Act (Imp.). Willmer, J., rightly considered that clause 3 of the conditions dealt with two different matters. The first part of the clause read:<sup>47</sup>

"The tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the hirer's vessel, or for loss of or damage to anything on board the hirer's vessel, or for loss of the tug or the hirer's vessel, or for any personal injury or loss of life, arising from any cause, including negligence at any time of the tugowner's servants or agents, unseaworthiness, unfitness or breakdown of tug...."

One of the tug-owners' claims was for damages. This suit was in negligence arising out of the improper navigation of the tow. The first part, being exemptive in character, was held to be insufficiently clear to exclude section 503 from operating in favour of the plaintiffs. The second part read:

"and the hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the tugowner against all consequences thereof...."

Following Lord Herschall's view,<sup>48</sup> the learned judge accepted the tug-owners' argument that the second part imposed a contractual liability on the plaintiffs to pay for all loss or damage caused to the tug. It had the effect of placing the plaintiffs in the position of insurers of the tug. Hence the "contractual obligation" method had operated to render inapplicable section 503. What seems inconsistent

46. [1956] 2 Lloyd's Rep. 651.

47. Ibid., p. 654.

48. The "Satanita" [1897] A.C. 59, pp. 64-65.

in his judgment is this. He found that the tug-owners had contracted for themselves and also as agents for the master and crew. He held that the claims in tort brought on behalf of the deceased were nevertheless subject to the operation of section 503. It is submitted that this aspect of the decision is unfounded and unduly restricts the parties' freedom to contract out of the statutory limitation of liability.

For completeness, we shall look at certain exclusion provisions of legislation which have far-reaching consequences in Australian maritime law. A summary of the facts of the House of Lords case of Stone No. 1 (Owners) v. Manchester Ship Canal Co. and Others<sup>49</sup> serves to provide the background information. As a result of improper navigation but without the owners' actual fault or privity, the appellants' barge sank in the Manchester Ship Canal and became an obstruction in the fairway to vessels navigating therein. Section 32 of the Manchester Ship Canal Act 1936 (U.K.)<sup>50</sup> empowered the company to cause the vessel to be raised or removed, and to recover from her owner "all expenses incurred...in connexion with that vessel." In respect of the expenses incurred, the appellants claimed to be entitled to limit their liability under sections 1 and 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 (Imp.). In unanimously affirming the Court of Appeal decision, the House of Lords was clearly of the view that sections 1 and 3 only operated to limit liability in tort, i.e. where it lay in damages. Lord Tucker explained the reasons for rejecting the appellants' claim as follows:<sup>51</sup>

"Under section 32 of the Manchester Ship Canal Act, 1936, however, the right to recover as a debt the expenses of raising a sunken vessel is given irrespective of any liability based on injury or damage. It is a different cause of action altogether."

Thus shipowners would be exposed to unlimited liability where the claim was brought on a basis other than negligence.

The gap is closed by the 1957 Convention. The right to limit

49. [1956] A.C. 1.

50. 26 Geo. V & 1 Edw. VIII, c. 124.

51. [1956] A.C. 1, p. 13.

liability is extended to claims whether they are founded on quasi-contract or legislation. Article 1 (1) (c) reads:

"The owner of a sea-going ship may limit his liability...in respect of claims arising from...any obligation or liability imposed by any law relating to the removal of any wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage to harbour works, basins and navigable waterways."

One significant difference between the laws of Australia and the United Kingdom is this. By section 2 (2) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (U.K.),<sup>52</sup> statutory effect was given to the Article. It is probable that, by reason of recognition of State and port authority rights, the Commonwealth Parliament has not given the force of law to the entire Convention. Section 333 of the Navigation Act 1912-73 (Comth.)<sup>53</sup> excludes "sub-paragraph (1) (c) of Article I of the Convention as part of the law of the Commonwealth." The protection, which is excluded, relates to two types of claim by port and harbour authorities. First, in respect of the expenses incurred in removing, raising or destroying a vessel sunk in a fairway, her owner is under a quasi-contractual liability at common law to reimburse<sup>54</sup> and/or under a statutory liability to indemnify such authorities. Second, with regard to collision damage to beacon, installation and other harbour works, Australian legislation, by which harbour boards and similar bodies are established, has imposed strict<sup>55</sup> unlimited liability on the master and the owner of the ship concerned. The harshness is compounded by the mandatory requirement to have a pilot on board particularly where the ship is within a port area or proceeding along a waterway. Section 410 B (2) of the Navigation Act 1912-73 (Comth.) imposes vicarious liability in circumstances where

52. Largely repealed; see Merchant Shipping Act 1979 (U.K.), Schedule 7 Part I.

53. As amended by Navigation Amendment Act 1979 (Comth.), s. 65 (1).

54. As to the circumstances where a right to be reimbursed may arise, see R. Goff and G. Jones, The Law of Restitution (1966), pp. 221-222.

55. See e.g. The Geelong Harbour Trust Commissioners v. Gibbs Bright Co. (1973-74) 129 C.L.R. 576; in China Ocean Shipping Co. v. State of South Australia (1978-79) 27 A.L.R. 1, p. 9, the Harbours Act 1936 (S.A.), s. 124 was held to impose absolute liability upon the ship's agent for damage done by the ship to any port installation.



the ship is navigated under compulsory pilotage according to a law of a State or Territory. The owner or master of a ship is answerable for any loss or damage caused by the ship or by faulty navigation of the ship, in the same manner as if pilotage were not compulsory.

## VII. NEW MARITIME CONVENTION

The Convention on Limitation of Liability for Maritime Claims 1976 was formulated to update and replace the 1957 Convention. In terms of international status, it will enter into force on the first day of the month, one year after the date on which twelve States have become parties to it. As of 19th October, 1983, there were seven State parties, which do not include Australia.<sup>56</sup>

From the viewpoint of Australia as a "shipping service" user, the 1976 Convention is preferred to the 1957 Convention, since the former provides higher limits of liability.<sup>57</sup> Under the 1976 Convention a person, including a shipowner, is not entitled to limit his liability in certain circumstances. However, a heavy onus has to be met by proving that the "loss resulted from his personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."<sup>58</sup> Commonwealth law differs from that of the United Kingdom in two respects. The latter has discarded the concept of "actual fault or privity" and has shifted the burden of proof to the claimant who seeks to break the limit of liability.

For further comparisons, reference is made to the new reliefs provided under Article 2 of the 1976 Convention. It covers a variety of claims resulting from, or arising in connection with, ship operation, salvage operations, including consequential loss, delay in the carriage of cargo, passengers or their luggage, and the removal or destruction of any cargo carried on a ship that is sunk, wrecked or abandoned. The Merchant Shipping Act 1979 (U.K.) confers wider relief than its

56. Information obtained from Mr. D.G. Kay, Marine Operations Division, Department of Transport, Canberra.

57. See Schedule 4 Part I, Article 6, Merchant Shipping Act 1979, currently in force in the United Kingdom.

58. Ibid., Article 4.

Commonwealth counterpart.

Another distinguishing feature is that, aside from certain cases of remuneration under contract, the limitation applies to claims under Article 2 (1), whatever the nature or basis of the liability. The protection extends to claims based on, or arising out of, negligence, salvage, subrogation, indemnity or any statutory right to recover, as a debt, the expenses or costs incurred.<sup>59</sup>

It is worth illustrating one new aspect of the relief available to salvors. In the Tojo Maru<sup>60</sup>—it may be recalled—a diver under water attempted to cover a gaping hole in a tanker with a wide plate by firing bolts from a Cox bolt gun. This operation was carried out before the adjoining tank was rendered gas-free. The result was an explosion which caused extensive damage to the tanker. As the counterclaim exceeded the salvage claim, the salvors sought to limit their liability under section 503 of the 1894 Act (Imp.). Their limitation suit failed. The House of Lords held that the negligence of the diver in firing the gun was not an act "in the navigation or management" of the tug; nor was it an act done by any person on the tug. If similar facts and mishap were to recur, the zealous but negligent salvor, his employer and the salving tug would be entitled to limit their liability under the 1976 Convention.<sup>61</sup> Needless to say, implementation of the provisions of the 1976 Convention as part of the law of the United Kingdom has conferred on shipowners and other persons an unprecedented protection.

59. E.g. it will cover a situation in Stone No. 1 (Owners) v. Manchester Ship Canal Co. and Others [1956] A.C. 1. There the claim against the owners of a sunken ship was in the nature of a statutory debt. Apparently the provisions of Article 2 (2) are wide enough to embrace claims founded on quasi-contract.

60. [1971] 1 All E.R. 1110. See also D.R. Thomas, "Salvorial Negligence and its Consequences" [1977] 2 L.M.C.L.Q. 167.

61. Schedule 4 Part I, Articles 2 para. 1 (a), 6 para. 4 and 9 para. 1, of Merchant Shipping Act 1979 (U.K.).

## VIII. CONCLUSION

The limitation of liability is one of the areas with regard to which Commonwealth and the United Kingdom's laws differ markedly. A number of anomalies in Commonwealth law, which have been highlighted, should be rectified, since they have adverse effects on Australian shipping trade.

The principle that cargo claimants have to rely on the common law doctrine of unjustified deviation or quasi-deviation in order to recover more than the "per package" or "unit"<sup>62</sup> amount under the Sea-Carriage of Goods Act 1924-73 (Comth.) is illogical and obsolete. Proof of unjustified deviation committed by a carrier or shipowner does not in itself automatically constitute evidence of actual fault or privity. Thus where a large consignment of high-valued cargo is lost or damaged, cargo claimants may have to clear two onerous hurdles under Commonwealth law before they could recover full compensation. Overseas importers of Australia goods, whether carried by Australian or foreign ships, are therefore disadvantaged.

This anachronism has been removed in the United Kingdom. Both the Hague Rules, as amended by the Brussels Protocol 1968, scheduled to the Carriage of Goods by Sea Act 1971 (U.K.)<sup>63</sup> and the Merchant Shipping Act 1979 (U.K.)<sup>64</sup> have adopted a similar burden of proof to be discharged by claimants. The growing importance of maritime trade to Australia's economy justifies an evaluation of the merits of adopting the 1976 Convention. In the interests of Australia's export trade involving the shipment of goods overseas in containers, it is imperative for statutory effect to be given to the Brussels Protocol 1968.

Moreover, Commonwealth legislation is necessary to deal with an existing anomaly. It should provide that discharge of the burden of proof required under the Protocol is deemed sufficient evidence of actual fault or privity of a shipowner within the meaning of Part VIII of the Navigation Act 1912-73 (Comth.).

62. Article IV rule 5 of the Rules scheduled to the Act.

63. See Article IV rule 5 (e).

64. Schedule 4 Part I, Article 4.

We have seen that section 333 of the Navigation Act 1912-73 (Comth.) has excluded the provisions of Article 1 (1) (c) of the 1957 Convention from operating as part of the law of the Commonwealth. It means that shipowners and other persons cannot limit their liability in respect of damage negligently caused to harbour works or waterways and expenses or liability incurred in raising wrecks or removing sunken vessels in the fairways. This disentitlement puts Australia-based ships at a disadvantage. The reason is that, since Australia-based ships use such port and harbour facilities and waterways more frequently than foreign ships, the former are more likely to be subject to unlimited liability than the latter.

In another respect, ships are placed under a more onerous liability under Australian law than under English common law. In Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad",<sup>65</sup> a dredge while digging a deep water channel at Botany Bay damaged a pipeline which was used to carry oil to a terminal owned by Caltex. Although the pipeline belonged to another party, the damage made it necessary for Caltex to make alternative arrangements for transporting the oil. The expenses incurred by Caltex amounted to \$95,000. Despite the English authorities<sup>66</sup> which do not allow purely economic loss to be recovered under the rule in Donoghue v. Stevenson,<sup>67</sup> the High Court of Australia unanimously found for the plaintiff on the special facts of the case. To enable Australia-based ships to compete successfully with overseas-based ships, legislation is necessary to give effect to Article 1 (1) (c).

In the introduction, reference was made to the search for a formula which would enable the risks of maritime transportation to be distributed among the parties to the adventure. The past twenty-five decades have witnessed many such risk-sharing adjustments.

65. (1976) 51 A.L.J.R. 270.

66. See Electrochrome Ltd. v. Welsh Plastics Ltd. [1968] 2 All E.R. 205; S. Thomson, "Negligence and Economic Loss" (1977) 40 M.L.R. 714; P.F. Cane, "Recovery of Purely Economic Loss in Australia" (1977) 9 L.Q.R. 333; D. Partlett, "Recovery of Economic Loss for Negligence in Australia" (1980) 9 Syd. Law R. 121.

67. [1932] A.C. 562.

Under the Responsibility of Shipowners Act 1734 (Imp.), a ship-owner's maximum liability for loss or damage caused without the "privity and knowledge" of the owner was limited to the value of the carrying ship, her appertenances and the freight.<sup>68</sup> Although the same underlying risk-sharing concept was used, the Merchant Shipping Act 1855 (Imp.) applied two methods of computing compensation - one for property damage and another for personal injuries and loss of lives.<sup>69</sup> Under the Merchant Shipping Act 1894 (Imp.) and the Navigation Act 1912-73 (Comth.),<sup>70</sup> as amended, computation of damages according to the product of the ship's tonnage and a statutory figure in francs is another instance of re-adjusting the risks. The Hague Rules scheduled to the Sea-Carriage of Goods Act 1924-73 (Comth.) contain a similar risk-sharing arrangement. In the absence of deviation or quasi-deviation, a carrier's liability is limited to no more than \$A200 per package or unit. A classic re-structuring of the formula is found in the Brussels Protocol 1968 and the Convention on the Limitation of Liability for Maritime Claims 1976. The elements of consent reached between the parties concerned are clearly reflected in the new formulae embodied in the 1968 Protocol and the 1976 Convention. Thus payment of a higher compensation<sup>71</sup> is seen as a trade-off for a more onerous burden of proof to be discharged by claimants seeking full compensation.<sup>72</sup>

The concept of "actual fault or privity" has been consistently used in Australian legislation to distinguish between two types of liability of shipowners. This expression is retained in the anti-pollution legislation, both Commonwealth and State, the Navigation Act

68. 7 Geo. II, c. 15, s. 1.

69. Proviso to s. 504.

70. By the Navigation Amendment Act 1979 (Comth.).

71. See Article IV rule 5 (a) of the Rules scheduled to the Carriage of Goods by Sea Act 1971 (U.K.); Schedule 4 Part I, Article 6 para. 1, Merchant Shipping Act 1979 (U.K.).

72. Carriage of Goods by Sea Act 1971 (U.K.), Schedule, Article IV, rule 5 (e); Merchant Shipping Act 1979 (U.K.), Schedule 4, Part I, Article 4.

1912-73 (Comth.), as amended, and Article IV rule 2 (b) of the Rules scheduled to the Sea-Carriage of Goods Act 1924 073 (Comth.). In giving effect to the Brussels Protocol 1968 and the Convention on Limitation of Liability for Maritime Claims 1976, the United Kingdom Parliament has, in fact, adjusted the risk-sharing formula. This difference between the laws of the two countries could in some cases offer claimants an alternative forum for recovering higher compensation.

## CHAPTER NINE

### ADMIRALTY JURISDICTION

#### 1. PREVIEW

Early colonial legislation had played a key role in the initial promotion of maritime trade and commerce.<sup>1</sup> Our survey of the growth of admiralty jurisdiction begins with an analysis of the colonial enactments. The object is to consider the means provided for enforcing the rights created by the emerging maritime law. An evaluation is made of the jurisdiction exercisable by the Justices of the Peace and the Supreme Courts over the claims commonly brought against British and foreign ships.

The next phase of development was characterised by the establishment of the Vice-Admiralty Courts in His Majesty's Dominions overseas to adjudicate upon maritime causes.<sup>2</sup> These Courts were the forerunners of the Colonial Courts of Admiralty. The jurisdiction exercisable by the Vice-Admiralty Courts shows the part played by Imperial policy and legislation in laying the framework for administering English admiralty law in the Australian colonies and elsewhere. It was Britain's long-term plan that these Imperial Courts should eventually attain an equal status with the High Court of Admiralty. This goal was achieved by the passing of the Colonial Courts of Admiralty Act, 1890 (Imp.).

It is interesting to consider how Australian courts have been affected in terms of the new jurisdiction and status conferred on them. The reorganisation of the courts was another Imperial strategy to empower the Colonial Courts of Admiralty to administer the merchant shipping legislation<sup>3</sup> on an Empire-wide basis. So long as the

1. See Chapter Two.

2. Supreme Court (Admiralty) Act 1832 (Imp.) (2 Willams IV, c. 51); Vice-Admiralty Courts Act 1863 (Imp.) (26 & 27 Vic., c. 24); Vice-Admiralty Courts Act Amendment Act 1867 (Imp.) (30 & 31 Vic., c. 35). As to the contributions made by Vice-Admiralty Courts, see J.M. Bennett, The Vice-Admiralty Court of New South Wales, Law Faculty Project, University of Sydney, 1968-69, pp. 112 et. seq.

3. E.g. the Merchant Shipping Act 1854 (Imp.), ss. 189, 191, 240, 486 and 490 conferred jurisdiction on Vice-Admiralty Courts. For provisions of the Merchant Shipping Act 1894 conferring jurisdiction on Vice-Admiralty Courts or Colonial Courts of Admiralty prior to the amendment by the Merchant Shipping Act 1970 (U.K.), see ss. 76, 167, 472, 554, 556 and 561.

heads of admiralty jurisdiction remain fixed under the 1890 Act (Imp.), the Commonwealth Parliament had to enact the Navigation Act 1912 (Comth.) along the lines of the Imperial legislation. The 1890 Act (Imp.) has therefore operated to determine the pattern of Australian shipping legislation<sup>4</sup> and also as the mechanism for the reception of English maritime law into Australia.

The wide gap that currently exists between the admiralty laws of Australia and the United Kingdom is the result of prolonged failure by the Commonwealth Parliament to remedy the situation. Many of the problems previously highlighted will be dealt with by reference to the proposed legislation which is long overdue.

## II. LEGISLATION OF AUSTRALIAN COLONIES

It will be recalled that, until the passing of the Admiralty Court Acts (Imp.), 1840 and 1861, the jurisdiction of the High Court of Admiralty was rather limited. The Courts of King's Bench, Common Pleas and Chancery exercised jurisdictions over a broad range of maritime matters - once the province of the High Court of Admiralty.<sup>5</sup> We saw in Chapter One that, after the Supreme Courts had been established in the Australian colonies, Imperial and colonial legislation empowered them to adjudicate upon similar maritime causes.

The early initiatives of the colonial legislatures to provide a framework in the Australian colonies have been examined in Chapter Two in relation to seamen and navigation. A closely related aspect is the mechanism for enforcing compliance with colonial enactments. The historical significance is that they represent the early attempts by colonial legislatures to confer on Australian courts jurisdiction over a limited number of maritime matters.

Apparently, the New South Wales Act of 1832<sup>6</sup> was the first move in this direction. Under section 15, two or more Justices of the Peace

4. With minor exceptions, the provisions are mainly modelled on the 1894 Act (Imp.).

5. See Chapter One.

6. 2 Gul. IV No. 10. This New South Wales Act did not apply to Tasmania which had become a separate colony in 1825.



were empowered to hear complaints by seamen or passengers against the masters or commanders of ships arriving from abroad in any part of the colony. Their jurisdiction related to claims for wages and breach of contract, and also to damages for assault and violence. It was limited to cases where the amount involved did not exceed ten pounds. An inexpensive and summary remedy for the redress of complaints was thus provided. If one criterion of an admiralty action in rem is the arrest and sale of the res so that the proceeds thereof can be used to meet the plaintiff's claim, the jurisdiction exercisable by the Justices of the Peace would, in a limited sense, lead to similar results. Payment of the amount, together with the costs of the summary proceedings awarded, could be enforced by warrants which directed the goods and chattels of the ship's master or commander to be levied. In so far as the goods and chattels levied by distress could be sold to provide a fund, the Justices of the Peace were seen as exercising a modified form of admiralty jurisdiction.<sup>7</sup>

Another aspect concerns the power to arrest ships arriving in New South Wales from abroad whilst on their way to any place outside the colony. The object of section 14 of the 1832 Act (N.S.W.) was to protect the rights of seamen who would otherwise be unable to enforce their wage claim once a foreign-going ship had left the colony. However, to prevent vexatious suits, before any arrest order was made by a judge of the Supreme Court or the Court of Vice-Admiralty, four stringent requirements had to be met by a seaman suing as plaintiff. The wages claimed must have been earned on board the ship during the current voyage. He had to discharge the burden of proving that there was a probable or reasonable cause for arresting the ship. There must have been no unreasonable delay in issuing the process against the ship. Security had to be furnished to the satisfaction of the judge for the payment of costs. However, the section fell short of empowering the judge to order the sale of the ship after judgment was obtained.

The New South Wales Act of 1849<sup>8</sup> conferred a similar jurisdiction

7. Ss. 15 and 17. There is little doubt that Vice-Admiralty Courts had power to sell the ship and goods under the Supreme Court (Admiralty) Act 1832 (Imp.), s. 6 to satisfy wage claims.

8. 13 Vic. No. 28.

to safeguard the rights of seamen engaged on ships registered in the colony and owned by British subjects. Where a wage claim was less than twenty pounds, a single Justice of the Peace was competent to summon the party, who had defaulted, to appear before him. An order for payment would be made forthwith. If the order was not obeyed within two days, section 15 empowered the Justice of the Peace to issue a warrant to levy the amount of wages awarded, including the costs, charges and expenses incurred in the action, by distress and sale of the goods and chattels of the defaulting party. Alternatively, the levy could be imposed on the ship, on which the seaman's service had been rendered, and the tackle and the apparel thereof. By section 19, admiralty jurisdiction to entertain suits against the ship was conferred on the Vice-Admiralty Court or the Court of Record. The section extended to situations where the wage claim exceeded twenty pounds, the shipowner was bankrupt, the ship was under arrest or ordered to be sold by the Vice-Admiralty Court, or where neither the shipowner nor the master resided at the place of the seaman's discharge. It applied irrespective of whether the wage claim was brought by a seaman or the ship's master. The underlying object of the colonial legislature in enacting the section was to ensure that the wages of seamen and masters were paid according to a high order of priority recognized in maritime law.

Section 10 of the Water Police Act 1853 (N.S.W.)<sup>9</sup> provided a summary mode of recovering wages earned and also compensation where a seaman was discharged in breach of the agreement before the voyage commenced. In each case, the jurisdiction exercisable by the Justice was limited to the award of not more than one month's wages.

The Seamen's Laws Consolidation Act 1864 (N.S.W.)<sup>10</sup> rationalized the colonial maritime law and in several respects extended the admiralty jurisdiction. One of its commendable objects was to establish a single body of law which applied to both foreign-going ships and New South Wales-registered ships owned by British subjects. Wages up to

9. 17 Vic. No. 36.

10. 27 Vic. No. 13.

fifty pounds and the costs of proceeding could be recovered in a summary manner before two Justices of the Peace. This right of enforcing such payments was extended to any apprentice or person who was duly authorised. The provision of section 50 was significant in that it authorised the master in certain circumstances to incur liability and expenses for the benefit of the voyage. Jurisdiction was conferred on the Court of Vice-Admiralty to entertain suits by the master based on any lien he had on the ship for unpaid wages, the right of set-off or any counter-claim, and the settlement of accounts arising between him and the shipowner.

New South Wales enactments on the subject passed before 1851 and 1859 operated as part of the laws of Victoria and Queensland, respectively, when they became separate colonies.

The first Tasmanian enactment,<sup>11</sup> which provided a summary mode of recovering wages not exceeding twenty pounds together with charges and expenses incurred in the proceedings before a Justice of the Peace, was passed in 1837. With minor exceptions, this jurisdiction to enforce payment corresponded to that exercisable by the New South Wales Justices. Default by the shipowner or party adjudged liable to make the payment for two days empowered the Justice to issue a warrant to levy the amount of wages awarded by distress and sale of the goods and chattels belonging to the shipowner or party involved. Where no goods and chattels were available, the Justice could order the wages awarded and the amounts incurred to be levied on the ship "or her tackle and apparel."<sup>12</sup> The right to invoke this summary procedure was open to any person employed in whatever capacity on board, including the master. Although in conferring the jurisdiction no distinction was made between foreign-going ships and locally-registered ships, the tenor of the Act seems to suggest that it was intended to apply only to seamen engaged in Tasmania.

The provisions of the Seamen Act 1859 (Tas.),<sup>13</sup> which empowered Justices of the Peace, the Supreme Court and the Court of Vice-Admiralty to exercise admiralty jurisdiction were adopted from the

11. 8 Wm. 4 No. 10.

12. Ibid., s. 20.

13. 23 Vic. No. 7. See e.g. ss. 49-53.

Merchant Shipping Act 1854 (Imp.). In essence, they set the pattern for the Seamen's Laws Consolidation Act 1864 (N.S.W.). This fact gives rise to the inference that the jurisdiction provisions of colonial Acts were largely, and indeed necessarily, modelled on Imperial legislation.

In South Australia, the Marine Board and Navigation Act 1881<sup>14</sup> was the first enactment which protected the rights of seamen, salvors and others. The jurisdiction<sup>15</sup> exercisable by the Justices of the Peace, the Supreme Court and the Court of Vice-Admiralty to enforce payment of wages and claims based on disbursements were similar to that conferred by the Tasmanian and New South Wales Acts.<sup>16</sup>

It was historic in that it gave to colonial Justices and the Courts unprecedented jurisdictional competence to deal with a number of maritime causes. The Supreme Court and the Court of Vice-Admiralty were empowered by the Act<sup>17</sup> to adjudicate upon disputes, claims and other matters arising out of salvage. By section 371, the jurisdiction exercisable by any Court or Justice extended to any ship or boat lying or passing off the coast within the limits of the province of such a Court or Justice. One notable aspect of the jurisdiction was the wide powers given to the Court, Justice or any magistrate. Payment of any amount could be levied by "distress or pounding" and, if necessary, "by the sale of the ship and her tackle."<sup>18</sup> What was remarkable was the admiralty jurisdiction exercisable over any foreign ship for damage or loss occasioned in whatever "part of the world" to property of Her Majesty or of any of Her subjects. Upon the receipt of an application made summarily, a judge of the Supreme Court or the Court of Vice-Admiralty was empowered to order the arrest of such a ship if found in any port, or place within three miles of the coast, of the colony. The ship would remain under arrest until compensation for the damage or loss caused was paid or security, approved by the

14. 44 & 45 Vic. No. 237.

15. *Ibid.*, ss. 88-90 and 92. The amending Act (No. 917 of 1904), s. 6 (3) extended the jurisdiction to disbursements or liabilities incurred by the master on the ship's account, the right of set-off, counter-claims and settlement of all accounts arising between the parties concerned.

16. Seamen Act 1859 (Tas.), ss. 49, 50 and 53; Seamen's Laws Consolidation Act 1864 (N.S.W.), ss. 48-50.

17. Marine Board and Navigation Act 1881 (S.A.).

18. *Ibid.*, s. 372.

judge, was given to cover the damages and costs that might be eventually awarded. As a practical safeguard, a foreign ship could be detained by a customs officer when directed by court order.<sup>19</sup> Moreover, if it appeared that before an order for arrest could be issued the foreign ship in question would depart beyond the three-mile limit of the colony, it was lawful for the Marine Board to detain the ship so as to provide enough time to obtain such an order.<sup>20</sup>

In terms of development in jurisdictional matters, Western Australia was far behind the other colonies. We have seen that her legislature<sup>21</sup> imported into the colony the provisions of Part II of the Imperial Merchant Shipping Act 1894 (Imp.). They related, inter alia, to the rights and remedies of seamen and masters. A number of Western Australian enactments<sup>22</sup> dealing with harbours and pilotage were passed. None of them were concerned with the conferment of power on the court to enforce wage claims or other rights against the ship. The only power which resembled admiralty jurisdiction was given in section 6 of Harbours and Pilotage Act 1873 (W.A.).<sup>23</sup> Where, after a survey and inspection had been carried out, any ship, hulk or vessel was found to be unfit for sea service, unsound, unsafe and a likely obstruction to navigation, the harbour master could require the owner or master to have her removed. Non-compliance with the requirement would entitle the harbour master to cast off or break the chain by which she was moored. The expenses incurred were recoverable by detaining her until they were paid, or from the proceeds of sale of the ship. Provision was made for the master or owner of the ship, hulk or vessel to challenge the result of the survey and inspection. Within the time period allowed and subject to sufficient security being given to cover the expenses of her removal, if necessary, an appeal could be taken to the Supreme Court.<sup>24</sup>

We shall revert to the effects of post-1890 colonial and State enactments after evaluating the contribution made by the Vice-Admiralty Courts.

19. Ibid., s. 378.

20. Ibid., s. 379.

21. See Merchant Shipping Act Application Act 1903 (W.A.) (3 Edw. VII No. 7), as amended by Act (W.A.) (No. 23 of 1919).

22. 9 Vic. No. 10; 14 Vic. No. 2; 16 Vic. No. 15; 18 Vic. No. 15 and 37 Vic. No. 14.

23. 37 Vic. No. 14.

24. Ibid., s. 6.

### III. VICE-ADMIRALTY COURTS

Chapter One deals with the importation into New South Wales of the principles of maritime law and admiralty practice. By Letters Patent, the Vice-Admiralty Court was invested with jurisdiction over certain maritime causes.<sup>25</sup> Fragmentary records, which have survived, show that as an Instance Court its jurisdiction in rem was rather limited.

#### 1. Early Conferment of Jurisdiction in Rem

To remove doubts as to the validity of the judgments in maritime causes given by, and to extend the admiralty jurisdiction of, the Vice-Admiralty Courts in Her Majesty's overseas possessions, section 6 of the Supreme Court (Admiralty) Act 1832<sup>26</sup> was enacted. For the first time, it specified the matters upon which the Vice-Admiralty Courts could adjudicate. As a prerequisite, the ship or her master had to come within the "local limits" of their jurisdiction. Virtually any person could commence proceedings in suits for "seamen's wages, pilotage, bottomry, damage to any ship by collision... salvage and droits of Admiralty." Extraterritorial jurisdiction was conferred in the sense that it was immaterial whether the cause of action arose within or outside the local limits of a Vice-Admiralty Court.

In the early years of their juridical role as maritime law courts, their competence and the validity of their judgments were often challenged by shipowners and masters whose ships and other related interests were the subject of admiralty proceedings in rem. Three cases suffice to illustrate some of the typical problems encountered by these Courts in the pre-1850 period.

In June 1844, the vessel Caroline<sup>27</sup> was arrested in an action

25. For letters Patent constituting the Vice-Admiralty Court, see G.B. Barton, History of New South Wales (1783-1789), vol. I, p.537. The Court was empowered, inter alia, "to award execution of the offenders convicted and attainted as aforesaid according to the civil law and the methods and rules of the Admiralty....": ibid., p.538.

26. 2 Williams IV, c. 51. Its long title read: "An Act to regulate the Practice...in the Vice-Admiralty Courts abroad, and to obviate doubts as to the jurisdiction." S. 6 began with these words: "And whereas in certain cases doubts may arise as to the jurisdiction of Vice-Admiralty Courts...."

27. Syd. Morning Herald, 14th December, 1848, p. 3, sub nom ex parte Hunter.

in rem brought by one Bolton in the Vice-Admiralty Court. The ship's master applied to the Supreme Court of New South Wales for an order of prohibition against the judge of the Vice-Admiralty Court. Apparently, in line with the authority exercised by Common Law Courts in restraining the High Court of Admiralty, the Supreme Court held that, as the contract under dispute between the parties was a specialty, the jurisdiction of the Vice-Admiralty Court was ousted.<sup>28</sup> The order of prohibition resulted in the release of the Caroline. It may be regarded as an exercise by the Supreme Court of its supervisory role in relation to the function of an Instance Court. It is arguable that, where the conditions in section 19 of the 1849 New South Wales Act<sup>29</sup> were satisfied, the Vice-Admiralty Court or the Court of Record was competent to entertain a wage claim, whether or not it arose out of a specialty.<sup>30</sup>

Another important issue relating to the jurisdiction of the Vice-Admiralty Court over foreign vessels arose in The Asa Packer.<sup>31</sup> In the action in rem brought by the ship's surgeon for unpaid wages, an American ship was arrested. The master objected on two grounds to the Court's assumption of jurisdiction. Firstly, the plaintiff had not signed the ship's articles. Secondly, the Court lacked jurisdiction over a foreign-registered ship. Support to the objection was also given by the United States consul's intervention in the action. The judge followed the propositions laid down by Dr. Lushington in The Golubchich<sup>32</sup> and several American decisions,<sup>33</sup> and gave judgment for the surgeon. In asserting juridical authority, he said:<sup>34</sup>

28. See Howe v. Napier (1766) 4 Burr. 1945; also Chapter One.

29. 13 Vic. No. 28.

30. The case was heard before the New South Wales Act bearing the date 2nd October, 1849, was passed.

31. N.S.W. archives 4/7599. See also The Ocean Queen (1879) 1 N.S.W.R. 99.

32. 1 Robinson 143.

33. The Jerusalem and The Aisah referred to in Syd. Morning Herald, April 2, 1950.

34. Syd. Morning Herald, 18th April, 1953, p. 2.

"...in these cases the Court has jurisdiction altogether independent of any consent of the representative of the foreign power to which the ship or seamen may belong; but notice is required to be given in all cases...in order that information may be obtained as to the propriety...of the jurisdiction being exercised."

The pronouncement entitling seamen to sue for their wages in foreign courts is consistent with the legislative policy of both Imperial and local Acts. These Acts were largely geared towards enabling seamen to recover their wages. It seems that the giving of notice to a "foreign power" representative was intended to comply with a principle of international law that a ship belonging to a foreign sovereign or foreign government could not be proceeded against *in rem*.<sup>35</sup> An exception applies where there is submission to the court's jurisdiction. The practice of Vice-Admiralty Courts, when administering Imperial laws, of obtaining such information was not a prerequisite under local laws. Section 15 of the 1832 New South Wales Act,<sup>36</sup> which empowered two or more Justices of the Peace to adjudicate summarily upon seamen's suits for wages against masters or commanders of ships arriving at the colony from abroad, was not subject to the giving of any such notice. No reference was made to any such notice or information in the Seamen's Laws Consolidation Act 1864 (N.S.W.),<sup>37</sup> which invested Vice-Admiralty Courts with *in rem* jurisdiction over ships, whether British or foreign.

Another interesting case involving the intervention of the Supreme Court was Lyons v. Elyard.<sup>38</sup> The whaling barque Jane was arrested under a warrant issued by the Vice-Admiralty Court. Despite the owner's efforts to put her in readiness to sail, the marshal placed a bailiff on board. The owner instituted proceedings in the Supreme Court against the marshal for damages for trover and trespass. As there was no evidence to go to the jury, the Chief Justice

35. See The Tervaete [1922] P., p. 226 *per* Bankes, L.J.; p. 271, *per* Scrutton, L.J.; p. 275 *per* Atkin, L.J.

36. 2 Gul. IV No. 10.

37. 27 Vic. No. 13. See also Marine Board and Navigation Act 1881 (S.A.), s. 379, which empowered the arrest of foreign ships.

38. (1846) 1 Legge 328.



directed a non-suit and found for the defendant marshall. The owner appealed to the Full Court of the Supreme Court on the ground that there was evidence of conversion. Upon the issues which arose from the special plea, a verdict was entered for the plaintiff with nominal damages. The Full Court held, however, that the arrest of the barque by the Vice-Admiralty Court officer was not strictly conversion. It was found that there was concurrent possession in the plaintiff and that there had been no taking of the ship inconsistent with the owner's right of possession. The marshall's act was held to be merely an assertion of his right or that of his agent, the bailiff, to remain on board until certain fees were paid or some other condition was met. Cognizance was thus taken of the authority of the marshall in carrying out his duties as an officer of the Vice-Admiralty Court.

Before the close of the nineteenth century Vice-Admiralty Courts had already been established in many parts of the British Empire.<sup>39</sup> A warrant for establishing a Vice-Admiralty Court in Van Diemen's Land was issued early on 1st September, 1825.<sup>40</sup> It is quite probable that by the beginning of the second half of the nineteenth century every Australian colony had a Vice-Admiralty Court set up to adjudicate upon maritime causes. We have noted that Part II of the Merchant Shipping Act 1854 (Imp.), which included provisions on ship mortgages, applied to the whole of Her Majesty's overseas possessions.<sup>41</sup> By this time British ship registries had been set up in most capital cities and centrally-located ports throughout Australia. The Imperial Act provided for registration of ship mortgages to be effected at appropriate ship registries, and safeguarded the interests of ship mortgagees. For decades, the Imperial merchant shipping

39. The Vice-Admiralty Court Act 1863 (Imp.), Schedule A, contained a list of forty-five British possessions or colonies, including the names of six Australian States, with pre-existing Vice-Admiralty Courts.

40. H.R.A. Ser. III, vol. IV, p. 598. The Letters Patent for establishing the Vice-Admiralty Court in New South Wales was dated 25th May 1787: H (R) N.S.W., vol 1, p. 542.

41. See s. 17 and s. 91 as regards the application of the Merchant Shipping Act 1894 (Imp.), Part I.

legislation had sought to promote shipbuilding, ship-repairing and ship-chandling industries in the Empire. These aims were achievable only if financiers, suppliers of necessities, repairers, shipbuilders and others were sufficiently protected under the laws of their territory. Few local merchants would run the risk of providing, on credit, stores or services to ships whose owners resided outside the colony, and conducted their business from overseas bases. It was impractical and often impossible for local merchants to institute personal actions against debtors who resided outside the jurisdiction of the colony's Supreme Court.

The preceding considerations, when seen in the context of Britain's Empire-building policy, weighed heavily in favour of investing Vice-Admiralty Courts with enlarged jurisdictions. It was essential for them to entertain admiralty proceedings in rem with regard to mortgage, towage, pilotage, disbursements, claims founded on contracts for the building, equipping or repair of ships, any question arising between registered shipowners, and claims for necessities supplied.

The Court of Admiralty Acts (Imp.), 1840 and 1861, restored to the High Court of Admiralty a substantial part of its ancient jurisdiction, previously taken away by Common Law Courts. At the time of their enactment, neither of the Acts applied to Vice-Admiralty Courts.<sup>42</sup> Fortunately, the gaps in the jurisdictional competence of the Vice-Admiralty Courts in all six Australian colonies along with others elsewhere<sup>43</sup> were filled by the Vice-Admiralty Courts Act 1863 (Imp.) and the Vice-Admiralty Courts Act Amendment Act 1867 (Imp.).<sup>44</sup> In particular, the 1863 Act (Imp.) was an epoch-making event. It confirmed the validity of the past proceedings of these Courts, amended their practice, upgraded their status as specialized

42. Their long titles and exclusive reference to "the High Court of Admiralty of England" clearly indicate this fact.

43. As to the list of such Courts, see Schedule A to the 1863 Act (Imp.) (26 & 27 Vic., c. 24).

44. 30 & 31 Vic., c. 45.

tribunals, and empowered them to adjudicate upon a larger category of maritime causes and matters. For the first time, the Registrar of a Vice-Admiralty Court was empowered to administer oaths relating to any matter in dispute. In collision suits, the judge could, on the application of either party, direct cross causes to be heard at the same time and on the same evidence. A joint action would save the parties time and expense, and avoid confusion as exemplified in the Privy Council case of A.S.N. Company v. Smith and Others, Smith and Others v. A.S.N. Company.<sup>45</sup> Here the cross causes were brought at common law by owners of the two ships involved in the collision, and were dealt with in separate trials. Moreover, under section 22 of the 1863 Act (Imp.), with the judge's permission, an appeal from a final sentence or order of a Vice-Admiralty Court would lie to Her Majesty in Council at the apex of the colonial judicial hierarchy. Unless otherwise expressly excluded in section 13, the Court was empowered to adjudicate upon those matters or causes within its competence. It was immaterial whether they arose within or beyond the limits of the colony.

It is noteworthy that the new powers given to Vice-Admiralty Courts were in addition to "the Jurisdiction conferred upon any Vice-Admiralty Court by any Act of Parliament" or "any other Jurisdiction now lawfully exercised by any such Court."<sup>46</sup>

## 2. Extension of Jurisdiction

The improved court machinery provided by the 1863 and 1867 Acts (Imp.) marked the beginning of a period of significant growth in colonial maritime law and admiralty jurisdiction.

One of the Imperial goals to be achieved was to render Vice-Admiralty Courts capable of administering the Merchant Shipping Act 1854 (Imp.) on an Empire-wide scale. The Ferret<sup>47</sup> appears to be the first case concerning section 187 of the Act (Imp.) to come before the Vice-Admiralty Court in Victoria. Apart from certain exceptions, the section prohibited any seaman from suing in rem for wages under fifty pounds in a Vice-Admiralty Court. A suit was brought jointly by six seamen for wages and compensation for wrongful dismissal. The amount claimed by each seaman exceeded, but

45. (1889) 6 W.N. (N.S.W.) 3.

46. Vice-Admiralty Courts Act 1863 (Imp.), s. 12.

47. (1882) 8 V.L.R. 1.

was reduced to less than, fifty pounds, although the total amount came to £203 19s. 8d. Sir. W.F. Stawell dismissed the suit on the ground that the court had no jurisdiction where none of the seamen was entitled to a minimum of fifty pounds. The narrow literal construction put on the section, if upheld, would deprive seamen of the advantages of bringing a joint admiralty action in rem against the ship in such circumstances. On appeal to the Privy Council, the decision was reversed. Their Lordships applied the Interpretation Act (Imp.)<sup>48</sup> and held that "the singular number shall include the plural." Thus section 189 was to be read: "No suit or proceeding for the recovery of wages under the sum of 50l. shall be instituted by or on behalf of any seaman or seamen." It was to be construed reddendo singula singulis.<sup>49</sup> Their Lordships held that since the total amount due to the six seamen was £203 19s. 8d., the judge had jurisdiction under the provision. Where a choice existed, the decision would encourage colonial seamen to sue under the Imperial Act.

In The Mary Campbell,<sup>50</sup> a suit for wages was instituted by the late master in a Vice-Admiralty Court against the ship's mortgagee in possession. The judge held that by section 191 of the Merchant Shipping Act 1854 (Imp.), the mortgagee claiming the right of a set-off was in the same position as the shipowner. He therefore had the benefit of payments made on account of wages and also of all other sums which the shipowner was entitled to deduct from the master's claim. It is true that the jurisdiction conferred by section 191 was sufficient to dispose of the issues raised. But suppose that the ship had to be sold and the proceeds of sale were insufficient to pay off the mortgage loan, the master's wages and the disbursements. The claims involved would fall outside the scope of the section. The Court was not empowered to pay those claims out of the fund according to their order of priority. It was largely to fill the gaps in the jurisdiction that the Vice-Admiralty Courts Act 1863 (Imp.) was passed. Moreover, many provisions of the 1854 Act (Imp.), which created valuable rights and provided for their exercise, made no mention of the tribunals which were competent to assume the

48. 13 & 14 Vic., c. 21; see the Interpretation Act 1889 (U.K.), s. 1 (1) (b), which is a re-enactment of the existing rule. For Privy Council judgment, see (1882) 8 V.L.R. 8.

49. It means "giving each to each."

50. (1871) 10 S.C.R. (N.S.W.) 261.

jurisdiction. Such uncertainty, if left unremoved, would result in time-consuming litigation and expensive appeals.

The extension of admiralty jurisdiction under the 1863 Act (Imp.) fulfilled a further object of Imperial policy. It operated as a mechanism for the reception into the Australian and other colonies a crucial body of principles of maritime law developed by English courts. Obviously some examples drawn from local decision will illustrate the enormous benefits which Australia has derived.

In The Tyburnia (No. 1),<sup>51</sup> the ship was sold under an order made in 1887 by the Vice-Admiralty Court of New South Wales. Apart from the wages owing to the master and seamen and disbursements incurred on account of the ship, there were other expense items, e.g. costs of sale, subsistence money and return fare for the crew. The extended jurisdiction meant consistency in the law. Judge Commissary, Sir F. Darley, C.J., imported English maritime case law to determine the nature and status of the claims. According to the equitable principles adopted, the master was allowed the expenses of waiting here (or detention money) to protect his interests until the case was finally decided. Subsistence money for mariners from the time of leaving the ship until their return home, the expenses of the journey home and costs of the action were held to have the same ranking as their wages. Thus subject to prior payment of the marshall's charges, costs of suit and costs of sale of the ship, the balance of the proceeds was applied in paying seamen's wages which had a higher priority than the master's wages and the disbursements. In view of the large number of case authorities followed, the decision stands out as a classic instance of direct application of English principles to maritime cases tried in the colonies.

In evaluating the contribution made by Vice-Admiralty Courts, it is equally vital to examine how the provisions, particularly those in section 10, of the 1863 Act (Imp.) were construed.

Referring to the purpose of the Imperial Parliament in enacting the Court of Admiralty Act 1840 (Imp.), Dr. Lushington said:<sup>52</sup>

51. (1887) 8 N.S.W.R. 1 (In Vice-Admiralty).

52. The Alexander, 1 W. Rob. 360, cited with approval by the Vice-Admiralty Court judge in The Nicaraguan Barque Courier (1879) 13 S.A.L.R. 124, p. 133.

"I may observe that when the recent statute conferred upon this Court a jurisdiction in these matters, or rather, perhaps, revived an ancient jurisdiction-long prohibited, it never was nor could be intended to alter the law, but merely to give a new remedy which was rendered necessary in the peculiar cases of foreign ships...."

The jurisdiction was exercised by Vice-Admiralty Court judges much in the light of the pre-1840 decisions and doctrines of the High Court of Admiralty. In the South Australian case of The Nicaraguan Barque Courier, decided in 1879, a ship on arrival at Wellington was fraudulently and furtively sold by her master. The purchasers appointed M as master and sent the ship to Adelaide, where repairs on her were made on M's orders. Proceedings were instituted by the shipwright against the vessel for the value of the repairs made. Judgment was given for the true owner who defended the action. He had in no way recognised the sale. To answer the question whether the repairs made would give rise to a maritime lien on the ship, the judge delved into English legal history. His research showed that the maritime lien was available in England to persons making repairs upon, or furnishing supplies to, a ship until the time when the Common Law Courts ousted the Court of Admiralty of its jurisdiction.<sup>53</sup> Section 6 of the Court of Admiralty Act 1840 (Imp.) conferred admiralty jurisdiction over claims, *inter alia*, "for necessities supplied to any foreign ship or seagoing vessel, and to enforce payment thereof." Dr. Lushington had held in Ella A. Clark<sup>54</sup> that the section gave rise to a maritime lien. The decision was admittedly based on the fact that claims for necessities were included in the section in the same collocation with other matters which carried maritime liens. It is submitted that Dr. Lushington had the intention of restoring the lien which had existed prior to the reign of Charles II. The Vice-Admiralty Court judge in the South Australian case had doubts that section 10 of the 1863 Act (Imp.) would give rise to a maritime lien for necessities supplied. He held that, on the facts of the case, the true owner was not responsible for the acts of M, the master, whose possession of the ship was wrongful.

Further support for the view that Vice-Admiralty Courts looked

53. (1879) 13 S.A.L.R. 124, p. 129.

54. Br. and L. 32. However, it was held by Mellish, L.J., in Two Ellens L.R. 4 P.C. 161 that no maritime lien was created by Admiralty Court Act 1861 (Imp.).

to pre-1840 authorities in interpreting the sections of the 1863 Act (Imp.) is found in The Macgregor - Heselton's Claim.<sup>55</sup> In an action for towage, a steamship was arrested in October, 1874, and bail was put in. One underlying question was whether section 10 of the 1863 Act (Imp.) invested the Vice-Admiralty Court with jurisdiction to entertain proceedings in rem to enforce towage claims. The Judge Commissary found that prior to 1840 there had been adjudications upon towage on the high seas,<sup>56</sup> "of which the case of Isbella"<sup>57</sup> is an instance." Although the suit instituted there was an action in rem for salvage, the award made was merely for towage service.

One feature characterised the approach of Vice-Admiralty Courts when adjudicating upon maritime causes. In the absence of pre-1840 decisions, these Courts would follow the interpretation placed upon the corresponding provisions of the Admiralty Court Acts (Imp.), 1840 and 1861, by the High Court of Admiralty. In this respect, the construction placed on various sections of the 1863 Act (Imp.) had an Imperial flavour. It was obvious that Vice-Admiralty Courts functioned as an extension of the High Court of Admiralty. They were set up in Her Majesty's colonies to administer English maritime law for the convenience of overseas claimants.

In The Ferret,<sup>58</sup> the ship was seized by the government of Victoria in April, 1881. An action in rem was instituted against the ship by certain seamen to recover, inter alia, wages and compensation for wrongful discharge before the termination of the agreement. Counsel for the shipowners argued that a claim for damages for wrongful discharge could not be added to that for wages. It was contended that the Court had not the inherent jurisdiction of the Court of Admiralty and that section 10 of the 1863 Act (Imp.) did not confer jurisdiction over such a claim. Sir W.F. Stawell, however, had no difficulty in overruling the objection by relying on the wide ruling of Sir Robert Phillimore in The Blessing.<sup>59</sup> The latter had held

55. (1876) 14 S.C.R. (N.S.W.) 107.

56. Ibid., pp. 109-111.

57. 3 Hagg. Adm. Rep. 427.

58. (1882) 8 V.L.R. 1.

59. 3 P.D. 35. In The Great Eastern, L.R. 1 A & E 384, the court entertained the claim for compensation in the nature of damages for wrongful discharge of a seaman before the agreement expired.

that the words "claim for wages" included a claim for wrongful dismissal apart from wages.

The case of The Macgregor - Heselton's Claim<sup>60</sup> has been considered. It is significant that the Judge Commissary treated section 10 of the 1863 Act (Imp.) as being in pari materia with section 6 of the Admiralty Court Act 1840 (Imp.) so far as conferment of jurisdiction was concerned. He said:<sup>61</sup>

"Since the passing of the 3 and 4 Vic., cap. 65, there have been many suits in rem for salvage in which the Court pronounced for towage only. The Princess Alice is one of them. There have been cases in which vessels have been proceeded against expressly for towage, such as the Christina<sup>62</sup> and the Martha<sup>63</sup> By the 10th section of the Vice-Admiralty Court Act...jurisdiction is given to the Vice-Admiralty Courts over (amongst others) claims in respect of towage. This can mean no other than jurisdiction in rem."

About eleven years later, in Stokes and Others v. The Conference,<sup>64</sup> the plaintiff in pursuing his claim relied heavily on the "similar meaning" doctrine. As shipowner's agent, he had paid premiums for the insurance on the ship and her freight. The question before the Vice-Admiralty Court in New South Wales was whether, in respect of the money paid, he could in the action against the ship claim for necessities. In support of his contention, the case of The Riga<sup>65</sup> was cited. There Sir Robert Phillimore made no distinction between necessities for the ship and necessities for the voyage, and held that insurance for freight was a necessary within the meaning of section 6 of the Admiralty Court Act 1840 (Imp.). His judgment in The Riga was based on the authority of Lord Tenterden in Webster v. Seekamp.<sup>66</sup> In the latter case, the brassfounder sued the shipowner at common law to recover the amount due for the coppering work done on the order of the master. The action succeeded on the ground that the coppering work was found to be necessary to the

60. (1876) 14 S.C.R. (N.S.W.) 107.

61. Ibid., p. 111.

62. 3 W. Rob. 27; S.C. 6 Moore P.C. 379.

63. 1 Lush. 314.

64. (1887) 8 N.S.W.R. 10 (In Vice-Admiralty).

65. (1872) L.R. 3 Ad. & Ec. 516. The word "necessaries" was widely defined by Dr. Lushington in The Perla (1858) Swab. 353. See also Roscoe, Admiralty Practice (5th ed.), p. 203.

66. 4 B. & Ald. 352. The definition of "necessaries" was adopted by the Privy Council in Foong Tai & Co. v. Buchheister and Co. [1908] A.C. 458, p. 466.



ship engaged in the Mediterranean trade. Undoubtedly, money advanced to a master to enable him to purchase necessities would be held recoverable in an action against the ship. However, in the Henrich Bjorn,<sup>67</sup> a fine and somewhat illogical distinction was drawn between (1) repairs made to, or things provided for the equipment of, the ship and (2) insurance of the vessel. The former were held to be "necessaries" within the meaning of section 6 of the Admiralty Court Act 1861 (Imp.), while the latter was regarded as something extraneous to her equipment for sea and for the shipowner's protection. Accordingly, Sir James Hannen expressly held that insurance premiums could not be regarded as necessities.<sup>68</sup> Following the decision in the Henrich Bjorn, the Judge Commissary in Stokes and Others v. The Conference<sup>69</sup> ordered the proceedings instituted by the plaintiff to be set aside. The pronouncement of Sir James Hannen is unfortunate. It introduced an unwarranted distinction, caused the raising of insurance premiums more difficult and expensive, and unduly restricted the jurisdiction of the court.<sup>70</sup>

An interesting aspect of the jurisdiction exercised is seen in The Ocean Queen.<sup>71</sup> Section 10 of the Vice-Admiralty Court Act

67. (1886) 11 App. Cas. 270.

68. It is submitted that the problem could have been avoided if the liability had been incurred by the master on account of the ship. It should have been recoverable as disbursement under the Vice-Admiralty Courts Act 1863 (Imp.), s. 10 (2).

69. (1887) 8 N.S.W.R. 10 (In Vice-Admiralty).

70. Even though the goods supplied were necessities, the right to bring an action in rem against the ship would be lost if at the time of the action the ship had been transferred to a new owner: The Henrich Bjorn (1886) 11 App. Cas. 270 (H.L.).

71. (1879) 1 N.S.W.R. 99.

1863 (Imp.) was applied in line with the Imperial policy which favoured seamen. The plaintiff was a foreigner who sought to enforce a wage claim against a foreign vessel in an Australian colony. The view was expressed that the provision only empowered the Vice-Admiralty Court to administer English maritime law to the exclusion of any foreign law. There the plaintiff, a French subject, had been employed under French law on board a French vessel as providore and steward. He instituted an action in rem to recover wages due and the amount for necessities supplied to the ship. Objections were raised on a number of grounds against the action. The French vessel was the property of an insolvent French company. By French law, the wages of a person serving on board any French ship outside the French dominions could only be paid to the French consul. Moreover, in the circumstances of the case, a creditor was prohibited from pursuing any remedy against the property of an insolvent company. The only action allowed was against the Syndic of the Insolvent Estate. Windeyer, the Deputy Judge Commissary, brushed aside the objections based on French law. He was of the view that, since the proceedings were in rem, "it is immaterial in whom the property in the ship is vested."<sup>72</sup>

In one crucial respect, the jurisdiction conferred on Vice-Admiralty Courts differed from that exercisable by the High Court of Admiralty. Section 6 of the Admiralty Court Act 1840 (Imp.) invested the High Court of Admiralty with jurisdiction in rem in respect of claims for necessities supplied to foreign vessels only. The apparent discrimination against foreign vessels somehow produced a disadvantage for British vessels, particularly those trading between Britain and the colonies. This anomaly in the jurisdiction meant that, as a matter of business prudence, necessities of whatever form would only be supplied on credit to British ships under a different arrangement. To bring the claim within the High Court of

72. Ibid., p. 103. Cf. The Cissie (1914) 10 Tas. L.R. 124. Here a Norwegian ship was involved and the Norwegian acting-consul protested against the Supreme Court of Tasmania entertaining the suit. The ship's articles provided that disputes between seamen and the master should provisionally be settled by the consular officer and eventually be determined by a Norwegian court. In exercising his discretion, Dobbie, J., held that the suit should not be proceeded with, reliance being placed on the authority of The Nina (1867) L.R. 2 P.C. 38.

Admiralty's jurisdiction exercisable in rem, necessities men would generally insist on certain security to be given, e.g. a bottomry bond or mortgage of the ship. The illogical distinction between foreign and British ships was later removed.<sup>73</sup> The High Court of Admiralty, however, was precluded from entertaining any action in rem for necessities where they were supplied to a ship at her port of registry or where at the time of instituting the action any owner or part-owner of the ship was domiciled in England or Wales. The reason for the exceptions is that in such situations the creditors would enjoy sufficient recourse against shipowners by instituting actions at common law.

Section 10 (10) of the Vice-Admiralty Courts Act 1863 (Imp.) which conferred admiralty jurisdiction in rem in respect of claims for necessities was narrowly couched. Its exercise was subject to two conditions being satisfied. Firstly, the philosophy of its Imperial counterpart was partly followed. It was inapplicable where the owner or part-owner of the ship was domiciled in the colony or possession "at the time of the necessities being supplied." Secondly, the necessities must have been supplied in the colony or possession in which the Vice-Admiralty Court was established. No distinction was made between British and foreign vessels. The provision conferred better protection on claimants than section 5 of the Admiralty Court Act 1861 (Imp.).<sup>74</sup>

Some of the difficulties faced by creditors were exemplified in the Victorian case of The "Albion", decided in 1872.<sup>75</sup> The facts were rather unusual. Before D was placed on the registry as the ship's master, he advanced \$5,000 to pay off and discharge the crew for insubordination. The ship, which had been transferred to, and registered in the name of, the brother of the former owner, was arrested in Melbourne. First, D was unable to recover the \$5,000 as disbursements because at the time of the advance another person

73. Admiralty Court Act 1861 (Imp.), s. 5.

74. One way of defeating a necessities man's right to bring an action in rem under s. 5 was to have the ship's registration transferred to the port where the necessities were supplied or for a part-owner to be domiciled there at the time of the action.

75. (1872) 3 V.L.R. 1.

was still officially employed as master. Second, his alternative claim for recovering the amount as necessities failed on the ground that the money was not supplied in Victoria. The Vice-Admiralty Court had no jurisdiction under section 10 (10) to entertain the action. Third, D was not allowed to offset the amount in question against a debt owed by him (for freight received) to the owner. Sir W.F. Stawell.<sup>76</sup>

"If I were to allow these necessities to be raised as an answer to a set-off, I should, in fact, adjudicate thereon in plain opposition to the section [i.e. section 10 (10)]...I do not think I have liberty to do so. It may be said that this is only another form of stating that debts must be mutual."

The proposition that an advance made or liability incurred could not qualify as disbursements unless the person making or incurring it had been officially appointed ship's master worked injustice. It unduly limited the court's jurisdiction under section 10 (2) at the expense of the master who, prior to his appointment, had advanced money or incurred liability for the benefit of the ship or her owners. It appears that, subject to the qualifying words "so far as the case permits", section 1 of the Merchant Shipping Act 1889 (Imp.) was introduced to enable a master to recover in the same way as his wages "disbursements properly made" and "liabilities properly incurred by him on account of the ship." Even if the section had been in force when the advance was made, D's action for disbursements would still have been unsuccessful.<sup>77</sup>

76. Ibid., p. 11.

77. In The Louise Roth [1905] S.A.L.R. 107, Gordon, J., held that a mate had no maritime lien on the ship for wages paid to the crew for overtime nor for necessary disbursements made by him at the master's request. As he was not the ship's master at the time when the payment and disbursements were made he was not protected by Marine Board and Navigation Act Further Amendment Act 1906 (S.A.), s. 6 (3). Moreover, he was not entitled to invoke the Merchant Shipping Act 1889 (Imp.), s. 1, later incorporated as s. 167 of the 1894 Act (Imp.).

#### IV. COLONIAL COURTS OF ADMIRALTY ACT 1890

Unquestionably, the construction of the Vice-Admiralty Court Act 1863 (Imp.) largely according to the meaning given by the High Court of Admiralty to similar provisions in the Admiralty Court Acts (Imp.), 1840 and 1861, had brought colonial court decisions into line with English admiralty law. Less than three decades after the groundwork for unifying admiralty jurisdiction was laid, the Colonial Courts of Admiralty Act 1890 (Imp.) was passed to reorganise the colonial courts administering maritime law. Indeed Lord Merrivale pointed out that the true intent of the 1890 Act (Imp.) was "to define as maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed."<sup>78</sup>

The establishment of Courts of Admiralty under one common system to replace the pre-existing Vice-Admiralty Courts was an important development in Imperial-colonial relationship. By the 1890 Act (Imp.), self-governing colonies are empowered to decide, within defined limits, the extent of the admiralty jurisdiction exercisable by their courts. Another difference between the old and new systems is this. Previously a judge of a Supreme Court of a British possession was made Vice-Admiralty Court judge by reason of an appointment from the British Admiralty. His jurisdiction was vested in him personally, although under the Vice-Admiralty Courts Act Amendment Act 1867 (Imp.) he was empowered to appoint one or more deputy judges to assist or represent him in executing the judicial powers.<sup>79</sup> However, by section 12 of the 1890 Act (Imp.), the jurisdiction is vested in the Court.

Except in the case of those British possessions named in the First Schedule to the 1890 Act (Imp.), the Vice-Admiralty Courts in various parts of the Empire were abolished by section 17. The four British possessions so named were New South Wales, Victoria, St. Helena and British Honduras. By section 16 (1) (a), the Act (Imp.) would come into force in the four British possessions when directed

78. *The Yuri Maru The Woron* [1927] A.C., p.915. See C.W. O'Hare "Admiralty Jurisdiction" (Part 2)(1979-80) 6 Mon. L. Rev., pp.207, et seq.

79. 30 & 31 Vic., c. 45, s. 5.

by an Order of Her Majesty in Council. An Order in Council dated 4th May, 1911,<sup>80</sup> was made to take effect from 1st July, 1911. New South Wales and Victoria were the only two Australian colonies in which the Vice-Admiralty Courts were retained until that date.<sup>81</sup> Another comparative aspect is worthy of note. In Australia, many of the more important maritime causes were adjudicated upon in the two possessions. It is likely that the exclusion of the two possessions in the 1890 Act (Imp.) was intended to provide a transitional machinery for appeals to be taken direct to Her Majesty in Council.<sup>82</sup> Accordingly, for over a decade, litigants in Australia had a choice of two different forums, appeals from which could go either to Her Majesty in Council or to the Full Court of the Supreme Court.<sup>83</sup>

By section 2 (1) every court of law in a British possession which is declared, as provided, will be a "court of Admiralty" with the jurisdiction conferred by the 1890 Act (Imp.). Alternatively, where no such declaration is in force in the possession, the court with original unlimited civil jurisdiction will be such a court of admiralty. By section 2 (2), the jurisdiction of a Colonial Court of Admiralty is the same geographically and otherwise as the admiralty jurisdiction of the High Court of England at the time of the passing of the Act.<sup>84</sup>

Prior to 1914, no declaration under section 3 of the 1890 Act (Imp.) had been made of any Australian court as the Colonial Court of Admiralty. Consequently, by section 2 (1), the High Court of Australia and every State Supreme Court, having unlimited civil jurisdiction, were deemed to be Colonial Courts of Admiralty. The High Court established under the Judiciary Act 1903 (Comth.) became a Colonial Court of Admiralty in 1903.

A serious uncertainty occurred regarding the status of the State Supreme Courts as Colonial Courts of Admiralty when the

80. No. 440 of 1911, Statutory Rules and Orders.

81. The 1890 Act (Imp.), s. 9 (1) expressly reserves to Her Majesty, by Commission under the Great Seal, to establish in a British possession any Vice-Admiralty Court or Courts.

82. Vice-Admiralty Courts Act 1863 (Imp.), s. 22.

83. The right of appeal from a single judge sitting in a Colonial Court of Admiralty to the Full Court of the Supreme Court is affirmed: McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd. (1945) 70 C.L.R. 175, p. 191, per Latham, C.J.

84. Ibid., p. 188.

Judiciary Act 1914 (Comth.)<sup>85</sup> was passed. By section 3, the following provision was inserted as section 30A of the Judiciary Act 1903 viz.:

"The High Court is hereby declared to be a Colonial Court of Admiralty within the meaning of the Imperial Act known as the Colonial Court of Admiralty Act 1890."

The problem was aggravated by the fact that the Commonwealth was for the purpose of section 18 (2) of the Interpretation Act 1889 (Imp.) a British possession.<sup>86</sup> It implied that the Supreme Courts in the Australian colonies were no longer Colonial Courts of Admiralty within the meaning of section 2 (1) of the 1890 Act (Imp.).

The validity of section 30A was rigorously challenged in John Sharp & Sons Ltd. v. The Ship Katherine Mackall.<sup>87</sup> In an action by a bill of lading holder against a ship for damage caused to the timber carried, the question raised was whether the High Court had jurisdiction. It was proved that the Judiciary Act 1914 (Comth.) was assented to by the Governor-General on the 29th October, 1914, instead of being reserved for the King's personal assent as required by section 4 of the Colonial Courts of Admiralty Act 1890 (Imp.).<sup>88</sup> On 7th September, 1916, Royal Assent was given to the proposed law. This fact was notified by publication in the Commonwealth Government Gazette on 16th November, 1916, of a copy of the King's Order in Council. In his classic judgment, Isaacs, J., highlighted the grounds for holding the Judiciary Act 1914 (Comth.) to be invalid. The two conditions of section 60 of the Commonwealth of Australia Constitution Act 1900 (Imp.) were not satisfied. First, the notification in the Commonwealth Government Gazette of 16th November, 1916, was not a speech or message to the Houses of Parliament or a proclamation. Second, the period of two years was exceeded, since the Governor-General's original assent was given on 29th October, 1914. The inefficacy of section 30A of Judiciary Act meant that "no such declaration is in force in the possession" for the purpose of section 2 (1) of the Colonial Courts of Admiralty Act 1890 (Imp.). Since the Commonwealth is a British possession and the High Court is a Colonial Court of

85. No. 11 of 1914.

86. (1945) 70 C.L.R. 175, p. 189.

87. (1924) 34 C.L.R. 420.

88. This section was repealed by the Statute of Westminster 1931 (Imp.), s. 6.

Admiralty, their Honours unanimously ruled that it has the jurisdiction.

Notwithstanding the High Court decision in 1924 that the Judiciary Act 1914 was void, it was the repeal of section 30A in 1939<sup>89</sup> that removed all the doubts. Moreover, McIlwraith McEacharn Ltd. v. Shell Co. of Australia Ltd.<sup>90</sup> went on appeal from the Supreme Court of New South Wales. The High Court of Australia held that, as a result of the repeal, the High Court and the State Supreme Courts are Colonial Courts of Admiralty. The decision confirmed that they are competent to exercise the admiralty jurisdiction as the High Court and as the Supreme Courts, respectively, and not as distinct Courts created by the 1890 Act (Imp.).<sup>91</sup>

The Act also confers the power to make rules for regulating the procedure and practice of Colonial Courts of Admiralty in the exercise of the jurisdiction. Under the proviso to section 7 (1), such rules, when made, would not come into operation until they have been approved by Her Majesty in Council. However, since the adoption in 1942 by the Commonwealth Parliament<sup>92</sup> of the Statute of Westminster 1931 (Imp.), the proviso has ceased to apply. Section 6 reads:

"...and so much of section 7 of [the Colonial Court of Admiralty] Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act."

The Commonwealth of Australia comes within the meaning of the expression "Dominion" in section 1 of the Statute of Westminster 1931 (Imp.). Section 6, read in conjunction with section 1, suggests that, while the rules relating to admiralty proceedings in the High Court will be exempted from the requirement of such approval, those relating to similar proceedings in State Supreme Courts might

89. By Act (Comth.) (No. 43 of 1939).

90. (1945) 70 C.L.R. 175.

91. This fact is reiterated by Pope, J., in Lewmarine Pty. Ltd. v. The Ship "Kaptayanni" [1974] V.R. 465, p. 468.

92. See Statute of Westminster Adoption Act 1942 (Comth.).



not be. There is, however, a general tendency to regard section 6 as applicable equally to the States individually. An example is found in Swift & Co. Ltd. v. The Ship S.S. "Heranger".<sup>93</sup> The Admiralty Rules enacted under section 7 were notified on 1st September, 1952, and according to their terms, came into force on 1st January, 1953. They were not reserved for the approval of the Queen in Council. The rule-making body of the New South Wales Supreme Court apparently assumed that such a requirement no longer applied. Interestingly enough, neither of the counsel raised the point that the omission had rendered the rules invalid. This fact led Macfarlan, J., to decide that section 6 of the Statute of Westminster 1931 (Imp.) had amended section 7 of the 1890 Act (Imp.), rendering the royal approval no longer necessary.

Another vital facet of the 1890 Act (Imp.) concerns the number of appellate courts that may be invested with the jurisdiction. It is bound up with the number of times a case may go on appeal within the hierarchy of courts in a British possession before the appeal lies to Her Majesty in Council. Section 5 reads:

"Subject to rules of court under this act, judgments of a court...given or made in the exercise of the jurisdiction conferred on it by this act, shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this act conferred upon a colonial court of admiralty."

In McIlwraith McEacharn Ltd. v. Shell Co. of Australia Ltd. Latham, C.J., touched on the underlying principle of the Act (Imp.). In his opinion, "a decision of the State Supreme Court in the exercise of jurisdiction conferred by the Colonial Courts of Admiralty Act is a decision of the Supreme Court in every sense."<sup>94</sup> We have seen that a colonial court with unlimited civil jurisdiction is given full and complete admiralty jurisdiction. Section 5 confers on the Full Court of the Supreme Court in its appellate sittings all the jurisdiction of a Colonial Court of Admiralty. In that case, it was admitted that there is a local appeal from a single Supreme Court judge exercising admiralty jurisdiction to the Full Court of the Supreme

93. (1965) 82 W.N. (Pt. I) (N.S.W.) 540.

94. (1945) 70 C.L.R. 175, p. 191.

Court. It was argued that the section did not permit an appeal to the High Court on the ground that it was not a "local" New South Wales court but an "Australian court". The Chief Justice construed the term "local appeal" in section 5 to mean an appeal from a particular locality. This meant a British possession where the appeal arose from a Colonial Court of Admiralty located therein. In this context, the British possession is Australia, not New South Wales; and the High Court is a court within that possession, not the Supreme Court of New South Wales. It was held that the inferior court, to which "local appeal" is defined by section 15 could be brought, was the High Court.<sup>95</sup> Dixon, J., correctly pointed out that there is no sufficient indication" in sections 5 and 6 of an intention to limit the number of successive appeals.<sup>96</sup> Their Honours took the view that the language of section 6 (1) appeared to give the right of appeal to the Privy Council from the last "decision on local appeal", i.e. from a judgment of the High Court exercising admiralty jurisdiction under the 1890 Act (Imp.). What their Honours have made clear is this. Under the Act (Imp.), the Full Court of any State Supreme Court, the High Court of Australia and the Privy Council are invested with appellate admiralty jurisdiction.

There were other reasons which led to the reorganization of the courts in Her Majesty's possessions and colonies overseas. They can be better understood by reference to English legal history. It seems certain that the Supreme Court of Judicature Act 1873 (U.K.) had set the process in motion. The High Court of Admiralty with its specialistic jurisdictions, procedure and practice was incorporated into the newly-formed "Probate, Divorce and Admiralty Division" as part of the High Court.<sup>97</sup> Unhealthy conflict between Common Law Courts and the High Court of Admiralty and, to some extent, duplication of proceedings were avoided. The causes which resulted in the reforms and the judicial co-operation following the amalgamation must have expedited the passing of the Colonial Courts of Admiralty Act 1890 (Imp.). This Act was really designed to effect the merger of the existing Vice-Admiralty Courts and colonial courts administering common law into a single juridical system. The goal was undoubtedly achieved with the abolition of the Vice-Admiralty Courts and the vesting of jurisdiction in the High Court of Australia and the State Supreme Courts. When dealing with maritime causes, these tribunals sit as Colonial Courts of Admiralty.

95. *Ibid.*, pp. 191-193.

96. *Ibid.*, p. 206.

97. 36 & 37 Vic., c. 66, s. 34.

## V. COLONIAL COURTS OF ADMIRALTY

### 1. Heads of Jurisdiction

We shall consider the juridical competence of such tribunals in relation to the nature and types of causes upon which they may adjudicate. Section 2 (2) of the 1890 Act (Imp.) empowers a Colonial Court of Admiralty to exercise the "Admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise...in like manner and to as full an extent as the High Court of England."

Prior to 1840, the subjects of admiralty suits in the High Court of Admiralty were confined to collisions between ships at sea, certain salvage agreements, hypothecation of ships and wage claims arising under ordinary contracts.<sup>98</sup> The Admiralty Court Acts (Imp.), 1840 and 1861, were passed to improve the practice and extend the jurisdiction of the High Court of Admiralty of England. Accordingly, under section 2 (2) and (3) of the 1890 Act (Imp.), a Colonial Court of Admiralty has jurisdiction over the following<sup>99</sup> - namely:

1. title to or ownership of any ship or vessel or the proceeds thereof in the Registry arising in any action relating to possession, salvage, damage, wages or bottomry;
2. claim in the nature of salvage;
3. damage received by any ship or sea-going vessel;
4. claim in the nature of towage;
5. claim for necessities furnished to any foreign ship or sea-going vessel;
6. claim for necessities supplied to any ship other than in the ship's port of registry, unless it is shown that at the time of the institution of proceedings her owner or part-owner is domiciled in the British possession;
7. claim for the building, equipping or repairing of any ship, provided it is under arrest at the time of instituting the proceedings;

98. See Chapter One.

99. These heads of jurisdiction are derived from the major provisions of the two Imperial Acts, 1840 and 1861. The Vice-Admiralty Courts Act 1863 (Imp.) and the Vice-Admiralty Courts Act Amendment Act 1867 (Imp.) were repealed by the 1890 Act (Imp.); see s. 18 and the Second Schedule. For jurisdiction under s. 2 (2) and (3) of the 1890 Act (Imp.), see D.J. Cremean, Jurisdiction in Admiralty in Australia, Ph. D. Thesis, Monash University, 1980, pp. 60 et. seq.

8. claim for damage to goods carried into any Australian port under a contract of carriage covered by a bill of lading;
9. claim for damage done to any ship;
10. claim for wages of seamen;
11. claim for wages of the master and disbursements made by him on account of the ship;
12. claim in respect of any mortgage registered under the Merchant Shipping Act 1854 (Imp.);
13. claim for life salvage from any British ship or boat anywhere, and life salvage from any foreign ship or boat wholly or partly in British waters;
14. matters relating to any British ship or share therein in respect of which the High Court of Chancery has powers under sections 62 to 65 of the Merchant Shipping Act 1854 (Imp.); and
15. all questions arising between the co-owners or any of them concerning the ownership, possession, employment and earnings of any ship registered at any Australian port or any share thereof, settlement of all accounts outstanding between the parties, and the sale of the ship or any share thereof.<sup>1</sup>

The jurisdiction outlined above under the various heads is not exhaustive. A number of gaps, which would otherwise undermine the administration of maritime law, were filled by subsequent Imperial and Commonwealth legislation.

## 2. Removal of Master

The High Court of Admiralty had, in a cause of possession, ancient jurisdiction to take a vessel from a wrongdoer and deliver it to the rightful owner. This power was later formally conferred under section 240 of the Merchant Shipping Act 1854 (Imp.) on any "Court having Admiralty Jurisdiction in any of Her Majesty's Dominions." Two of the conditions to be met were the presence of the ship within the court's jurisdiction and proof that the removal of the ship's master "is necessary". Since the word "necessary" was not defined, the courts were able to construe it in the light of the particular problem presented in each case. In The Fairport,<sup>2</sup> the master took the ship to sea against the wishes of the ship mortgagee who had taken possession of the same. His act was held to constitute a misconduct. In exercising its jurisdiction for his removal,

1. Re Blanshard (1823) 2 B & C 244. According to Halsbury's Laws of England (4th ed.), vol. 1, para. 313, suits of possession were entertained by the Court of Admiralty in the exercise of its inherent jurisdiction.

2. (1885) 10 P.D. 13.

the court ruled that he was not entitled to compensation for dismissal before the expiration of the employment contract. Obviously a master's removal is necessary where, by his act or conduct, damage or injury is maliciously caused to the ship, other property or to persons.<sup>3</sup> Another situation where the power is exercisable is exemplified by the facts of The Nicaraguan Barque Courier.<sup>4</sup> The Vice-Admiralty Court in South Australia restored the ship to the rightful owner. The master appointed by the purchaser who had no title to her was removed. Section 240 also empowered the court to order the suspension or cancellation of a master's certificate, and to require security in respect of the costs in the matter to be given.

The provision was reproduced, virtually verbatim, in section 472 of the Merchant Shipping Act 1894 (Imp.) and also in section 385 of the Navigation Act 1912-73 (Comth.). Section 385 has been amended to read:

"Any Court having jurisdiction may remove the master of any ship within the jurisdiction of that court if it thinks necessary to do so."<sup>5</sup>

### 3. Dangerous Goods

Section 449 of the Merchant Shipping Act 1894 (Imp.) makes one of the few post-1890 additions to the list of admiralty suits. It applies to the improper sending or carriage of "dangerous goods", and to any attempt to carry them on board any ship, British or foreign. Section 449 (1) is breached where such goods are not marked as required or bear a false description, where a false description of the sender or carrier is given, or where the necessary notice has not been given. Any court having admiralty jurisdiction may declare the goods to be forfeited. When forfeited, the goods may be disposed of as the court directs. It is remarkable that by section 449 (2) such powers are exercisable at the court's discretion even though the goods-owner has not committed an offence under the Act relating to dangerous goods, is not before the court, and has no notice of the proceedings.<sup>6</sup> The wording of section 446 (3)

3. The "Ida" (1860) Lush. 6.      4. (1879) 13 S.A.L.R. 124.

5. Navigation Amendment Act 1980 (Comth.), s. 98 (1).

6. Article IV rule 6 of the Hague Rules scheduled to the Sea-Carriage of Goods Act 1924-73 (Comth.) applies to the shipment of physically dangerous goods without the appropriate consent of the carrier. He incurs no liability for having such goods landed at any place, destroyed or rendered innocuous. The shipper is liable for all damages and expenses arising out of the unauthorised shipment.

appears to confine the definition of "dangerous goods" to goods and commodities which are physically dangerous. At common law, the term has a wider meaning. The carriage of goods, which renders the voyage illegal or might involve the ship in danger of forfeiture or delay, is analogous to the shipment of "dangerous cargo which might cause the destruction of the ship."<sup>7</sup> The common law meaning extends to goods which, by reason of improper or insufficient packing, cause loss or delay to the carrying vessel, damage to property or personal injuries.<sup>8</sup>

There is, however, some doubt about the sphere of operation of section 449. Neither the section nor any provision in Part V of the Act (Imp.) states that the power conferred is exercisable by courts in Her Majesty's possessions and colonies.

The provisions of the Navigation Act 1912-73 (Comth.) relating to the carriage of dangerous goods and their forfeiture in certain circumstances are Imperial in origin. The power exercisable under section 252 to order forfeiture of dangerous goods in certain situations is conferred on "any Court having Admiralty jurisdiction." Thus the High Court, any State Supreme Court and the Western Australian Broome Court,<sup>9</sup> being Colonial Courts of Admiralty under the 1890 Act (Imp.), are invested with new jurisdiction. The language of section 252 does not indicate an attempt by the Commonwealth Parliament to confer on Australian courts original jurisdiction to deal with "Admiralty and maritime" causes.<sup>10</sup>

#### 4. Beneficial Interest

The decisions in Follett v. Delany<sup>11</sup> and The Liverpool Borough

7. Per Atkin, J., in Mitchell, Cotts v. Steel [1916] 2 K.B. 610, p. 614. As to contraband cargo, see The Diamond [1920] P. 56.

8. Scrutton on Charterparties and Bills of Lading (19th ed. 1984), op. cit., pp. 102-104.

9. The Broome Local Court of Admiralty Jurisdiction Act 1917 (W.A.). For a brief discussion on this Court, see Research Paper No. 1 - An Australian Admiralty Act; The Ambit of Admiralty Jurisdiction (November 1984), p. 25.

10. Within the meaning of the Commonwealth of Australia Constitution Act 1900 (Imp.), ss. 76 (iii) and 77 (iii).

11. (1848) 17 L.J. Ch. 254. See Chapter Four.

Bank v. Turner<sup>12</sup> are recalled. They demonstrate the unjust results which followed when courts were prevented from applying the principles of equity to transactions involving ships or shares therein. In consequence, section 3 of the Merchant Shipping Act Amendment Act 1862 (Imp.), later expanded and re-enacted as section 57 of the 1894 Act (Imp.), was passed. The provision has remedied defects in the law. It takes cognizance of beneficial interests, thus empowering the courts to entertain claims founded on principles of equity and contract.

The Shipping Registration Act 1981 (Comth.) provides for the recognition and enforcement of certain equities. Section 47, which is largely modelled on section 57 of the 1894 Act (Imp.) reads:

"Subject to sections 41, 45 and 46, beneficial interests may be enforced by or against the owner or mortgagee of a ship or a share in a ship in respect of his interest or share in the same manner as in respect of any other personal property."

Despite the repeal of Part I of the 1894 Act (Imp.) as part of the law of the Commonwealth,<sup>13</sup> section 47 operates to retain the pre-existing position. When exercising jurisdiction with regard to beneficial interests or claims in equity, Australian courts are bound to give effect to certain statutory rights. Subject to the exceptions imposed, an owner<sup>14</sup> or mortgagee<sup>15</sup> of a ship or any share therein is entitled to dispose of the ship or share therein and to give effectual receipts in respect of the disposal.

##### 5. Loss of Life

We have seen that the expression "damage done by any ship" in section 7 of the Admiralty Court Act 1861 (Imp.) had produced much litigation. The controversy as to its scope of application was finally resolved by the House of Lords in The Vera Cruz.<sup>16</sup> An action *in rem* was brought by the administratrix of S, against the Spanish steamship Vera Cruz, for damages occasioned by the death

12. 29 L.J. Ch. (N.S.) 827; affirmed 30 L.J. Ch. (N.S.) 379.

13. See Shipping Registration Act 1981 (Comth.), ss. 3 (1) and 4.

14. *Ibid.*, s. 45.

15. *Ibid.*, s. 41 (1). For insertion of subsections, see Shipping Registration Amendment Act 1984 (Comth.), s. 15.

16. Mary Seward v. Vera Cruz (1884) L.R. 10 C.P. 59.

of S, the master of the Agnes, which was run into by the Vera Cruz. The owner of the Vera Cruz was never in England and not served with a writ personally. The Court of Appeal held that, since the real cause of action was "in fact pecuniary loss" affecting the interests of the deceased's family, "it is not a cause of action for anything done by a ship" within the meaning of section 7. As the purpose of the action brought by the representative of the deceased was to recover damages for loss of life caused by "wrongful act, neglect or default," the proceedings should have been instituted under Lord Campbell's Act (U.K.).<sup>17</sup> On appeal, the House of Lords unanimously affirmed the decision on the ground that section 7 did not give the Court of Admiralty jurisdiction over claims for damages for loss of life arising under Lord Campbell's Act.

With the exception of New South Wales<sup>18</sup> and Queensland,<sup>19</sup> it was not until after 1934 that the remaining Australian States passed legislation similar to Lord Campbell's Act. The common law rule that causes of action in tort, which were vested in the person at his death, were extinguished by his death was therefore altered by Australian State legislation.

The International Convention for the Unification of certain Rules of Law with respect to Collisions between Vessels, 1910,<sup>20</sup> contains a provision which appears to have the object of changing the common law rule. Article 4 states, *inter alia*, that "In respect of damages caused by death or personal injuries, the vessels at fault are jointly as well as severally liable to third parties...." Taken in its plain literal sense, the provision seeks to introduce a uniform rule in those countries which are signatories to the Convention. The purpose - it is submitted - is to confer a right to compensation for loss of life or personal injuries negligently caused by two or more vessels. It is idle to talk of the joint and several liability of the vessels at fault if the right to recover damages does not survive the death of a victim in favour of his estate. Section 260 (1)

17. (1846) 9 & 10 Vic., c. 93.

18. Compensation to Relatives Act (N.S.W.) (No. 31 of 1897), s. 3.

19. Common Law Practice Act 1867 (Qld.) (31 Vic. No. 17), s. 12.

20. We saw in Chapter Seven that effect was given to it in the United Kingdom under the Maritime Convention Act 1911 (Imp.). For position in Australia, see the Navigation Act 1912 (Comth.), ss. 259-265 and s. 396.



of the Navigation Act 1912-73 (Comth.), which gives effect to the provision, makes the position even clearer as follows:

"Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the vessels shall be joint and several."

Whether admiralty jurisdiction to award damages in respect of loss of life or personal injuries is conferred by Commonwealth legislation is an important question.<sup>21</sup> It is interesting to note that not long after section 260 (1) was enacted, section 30 of the Judiciary Act 1903-1912 (Comth.) was amended to read, inter alia, "in all matters - ... (b) of Admiralty or maritime jurisdiction."<sup>22</sup> Section 30A, which was inserted at the same time, declared the High Court to be a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act 1890 (Imp.).<sup>23</sup> It may be recalled that by a New South Wales Act the Crown was rendered suable in tort.<sup>24</sup> Later, the provisions of this colonial Act was consolidated as sections 56 and 58 of the Judiciary Act 1903-1973 (Comth). Moreover, until section 405A (1) of the Navigation Act 1912-73 (Comth.) was introduced in 1958,<sup>25</sup> it was competent to institute proceedings in rem against ships or cargo belonging to the commonwealth or an Australian State.

It is arguable that the preceding developments evince a legislative move towards allowing claims for loss of life to be brought under Commonwealth law. Due to the invalidity of the Judiciary Act 1914 (Comth.),<sup>26</sup> which inserted sections 30 (b) and 30A, and their subsequent repeal,<sup>27</sup> the Commonwealth Parliament apparently suffered

21. The principle that, apart from statute, the death of a human being per se is not actionable is well established as part of the common law: The Amerika [1914] P. 167; [1917] A.C. 38.

22. Judiciary Act (No. 11 of 1914) (Comth.), s. 2.

23. Ibid., s. 3.

24. We saw that in Farnell v. Bowman (1887) 12 App. Cas. 643 the Privy Council affirmed the judgment of the Chief Justice. It was held that under the New South Wales Act (39 Vic. No. 38) the government of the colony could be sued in tort.

25. Inserted by the Act (No. 36 of 1958) (Comth.), s. 191.

26. For reasons, see John Sharp & Sons Ltd. v. The Ship Katherine Mackell (1924) 34 C.L.R. 420, pp. 429-431, per Isaac, J., in particular; see also Union Steamship Company of New Zealand Ltd. v. The Ship "Caradale" (1937) 56 C.L.R. 277, p. 281, per Dixon, J.

27. By Judiciary Act (No. 43 of 1939) (Comth.), ss. 2 and 3.

a setback in its efforts to confer on the High Court "original jurisdiction...(b) in all matters of Admiralty or maritime jurisdiction."<sup>28</sup>

The argument seems to be supported by the clear wording of section 262 which was part of the Navigation Act 1912 (Comth.) when it was first passed. It reads:

"Any enactment which confers on any Court Admiralty jurisdiction in respect of damages shall have effect as though reference to such damage included references to loss of life and personal injuries, and accordingly proceedings in respect of such damages may be brought in rem or in personam."

It is submitted that the "enactment" referred to in section 262, which confers admiralty jurisdiction, is the Colonial Courts of Admiralty Act 1890 (Imp.). It is not unreasonable to suggest that, when section 7 of the 1861 Act (Imp.) is construed in conjunction with section 262, the words "damage done by a ship," in circumstances where the ship is the noxious instrument, could include loss of life. If the reasoning thus far is correct, we have uncovered a unsuccessful attempt by the Commonwealth Legislature to provide redress for loss of life at the time when none existed under the laws of four Australian States.<sup>29</sup> What is clear is that some post-1900 steps were taken by the Commonwealth Parliament to enlarge the admiralty jurisdiction of the High Court.

#### 6. Other Aspects

Several other causes upon which an admiralty court is empowered to adjudicate are considered.

The rigors of the Imperial policy which prohibits foreigners from owning British ships or any share therein have been maintained. If any unqualified person acquires as owner, otherwise than by transmission, any legal or beneficial interest in a ship using a British flag and assuming a British character, that interest shall be subject to forfeiture.<sup>30</sup> Subject to certain exceptions, where a person uses a British flag and assumes the British character on

28. Judiciary Act (No. 4 of 1915) (Comth.), s. 2.

29. See, however, later State legislation to fill the gaps: Wrongs Act 1958, Part III (Vic.), s. 16; Wrongs Act 1936, Part II (S.A.), s. 19; Fatal Accidents Act 1959 (W.A.), s. 4; Fatal Accidents Act 1934 (Tas.), s. 4.

30. Merchant Shipping Act 1894 (Imp.), s. 71.

board a ship owned wholly or in part by an unqualified person, for the purpose of passing off as a British ship, the ship will be subject to forfeiture.<sup>31</sup> Where any ship or any share therein has become subject to forfeiture, she may be seized, detained and brought for adjudication "before the High Court of England...any Colonial Court of Admiralty or Vice-Admiralty Court in Her Majesty's Dominions."<sup>32</sup> In the absence of reasonable grounds for seizure and detention, the court is empowered to award costs and damages to the aggrieved party and make such other order as it thinks fit.<sup>33</sup> The above provisions are contained in Part I of the Merchant Shipping Act, 1894 (Imp.), which has been repealed by section 4 of the Shipping Registration Act 1981 (Comth.). It appears that Colonial Courts of Admiralty in Australia no longer have jurisdiction to entertain forfeiture proceedings instituted under the 1894 Act (Imp.).

Unlike the 1894 Act (Imp.), the Shipping Registration Act 1981 provides for forfeiture only in two situations. Subject to certain exceptions, where a non-Australian ship improperly assumes Australian nationality, she is subject to forfeiture.<sup>34</sup> Moreover, without parallel in Imperial legislation, section 33 prohibits the master or owner of an Australian ship from doing, or permitting to be done, anything which conceals the Australian nationality of the ship. Except where the proviso applies, the ship is subject to forfeiture. One obvious defect in the law is the absence of any provision which enables an aggrieved party to recover costs and damages where the ship has been seized or forfeiture proceedings have been instituted without sufficient grounds.<sup>35</sup> Despite the serious nature of forfeiture proceedings, there is uncertainty as to which court may assume jurisdiction in such matters.

With regard to claims relating to registered ship mortgages<sup>36</sup>

31. Ibid., s. 69.

32. Ibid., s. 76 (1).

33. Ibid., s. 76 (2).

34. S. 32.

35. There will be heavy financial loss caused to shipowners and great inconvenience to owners of the goods carried because of delay in transit or the transhipment required.

36. The Admiralty Court Act 1861 (Imp.), s. 11 confers jurisdiction in respect of mortgages "duly registered according to the provisions of the Merchant Shipping Act 1854." See also M.J. Calder, "Footnote to the C.M.I. Questionnaire on Maritime Liens and Mortgages," M.L.A.A.N.Z. (March, 1983) vol. 1 No. 1, p. 14.

and the limitation of liability of shipowners and others, the jurisdiction of Colonial Courts of Admiralty was derived almost exclusively from Parts I and VIII of the Merchant Shipping Act 1894 (Imp.). Currently in the United Kingdom and certain British colonies, ship mortgages are registered according to the provisions in Part I of the 1894 Act (Imp.). The repeal of Part I<sup>37</sup> rendered Australian courts incompetent to adjudicate upon causes and questions arising out of such mortgages. The reason is that the 1894 Act (Imp.), being a consolidating legislation, has re-enacted provisions rather similar to those of its predecessor. By section 38 (2) of the Interpretation Act 1889 (U.K.), the reference in section 11 of the Admiralty Court Act 1861 (Imp.) to mortgages registered under the 1854 Act (Imp.) shall be construed as reference to mortgages registered under the 1894 Act (Imp.).<sup>38</sup> It is arguable that the repeal of Part I of the 1894 Act (Imp.) involves the revocation of the jurisdiction previously conferred on Australian courts by section 11 of the 1861 Act (Imp.).

In General Credits (Finance) Ltd. v. Registrar of Ships and Another,<sup>39</sup> competing interests in the m.v. Whitsunday Wanderer and an application under section 59 of the Shipping Registration Act 1981 (Comth.) for rectification of the register were involved. The Supreme Court of Queensland held that the registered owner or mortgagee of a ship has priority which may displace the rules of common law and equity. There is nothing to suggest that in applying the provisions of the Commonwealth Act the Court was sitting in admiralty. Doubts therefore existed as to which courts were competent to exercise jurisdiction in rem to entertain claims arising out of the mortgages of ships or any shares therein registered under this Act. This problem was, however, remedied when the Shipping Registration Amendment Act 1984 (Comth.) came into force.<sup>40</sup> Section 29

37. Shipping Registration Act 1981 (Comth.), ss. 3 (1) and 4.

38. See M. Thomas and D. Steel, The Merchant Shipping Acts (7th ed. 1976), op. cit., para. 59.

39. (1982) 44 A.L.R. 571.

40. S. 94A has been inserted as a new provision in the Shipping Registration Act 1981 (Comth.).

reads:

"Section 11 of...the Admiralty Court Act 1861 shall have effect and shall be deemed to have had effect...as if references in that section to mortgage duly registered according to the provisions of the Merchant Shipping Act 1854, included references to a mortgage registered or deemed to have been registered under this [Shipping Registration Act]."

One interesting observation is this. By enlarging the jurisdiction conferred by section 11 of the 1861 Act (Imp.) to embrace claims in respect of ship mortgages effected under the Shipping Registration Act 1981 (Comth.), the Commonwealth Parliament is relying on the Colonial Courts of Admiralty Act 1890 (Imp.). Accordingly, admiralty jurisdiction over the mortgages of Australian ships or shares therein continues to be exercisable under Imperial legislation, as amended by the Shipping Registration Amendment Act 1984 (Imp.).

The repeal of Part VIII of the Merchant Shipping Act 1894 dealing with the limitation of liability of shipowners and others and its replacement by Part VIII of the Navigation Act 1912-73 (Comth.) have been noted. By section 335 of the Navigation Act 1912-73, as amended, where a claim is brought in the Supreme Court of a State or Territory against a person for damage or loss sustained, he may apply to the same Court for an order limiting his liability. Even before any action is brought against him, he can take the initiative of instituting a limitation suit in any such Court. The section does not prevent a Colonial Court of Admiralty from adjudicating upon limitation suits.<sup>41</sup> Some examples will help to explain the scope of the section and the jurisdiction conferred thereunder. Suppose that, for personal injury or property damage caused to X as a result of negligent navigation of the m.v. Fairy owned by Y, an action in rem for damages is instituted in a State Supreme Court.<sup>42</sup> Under the law as it stands at present, the proceedings are of such a nature that they can only be brought within the jurisdiction of the Court sitting as a Colonial Court of Admiralty. In the same Court, Y is entitled to apply for an order limiting his liability as provided by

41. "...a decision of the Supreme Court in the exercise of jurisdiction conferred by the Colonial Courts of Admiralty Act is a decision of the Supreme Court in every sense": McIlwraith McEacharn Ltd. v. Shell Co. of Australia Ltd. (1945) 70 C.L.R. 175, p. 191, per Latham, C.J.

42. The principle equally applies to an Admiralty action in personam. See Gaggin v. Moss [1983] 2 Qd. R. 486 and Admiralty Court Act 1861 (Imp.), s. 35 under which Admiralty jurisdiction is exercisable whether the proceedings are in rem or in personam. Moreover, it is convenient to empower the court to deal with the right to limit liability in the action of the claimant against the ship: Gates v. Gaggin and Another (1983) 51 A.L.R. 721, p. 724.

Article 1 (1) of the 1957 Convention.<sup>43</sup> Alternatively, in anticipation of the negligence suit against him whether in admiralty or at common law, Y may apply to any Supreme Court for an order limiting his liability. Section 335 (1) (b) of the Navigation Act 1912-73, as amended, confers jurisdiction on a Supreme Court and also on the High Court to entertain limitation suits.

There is one other aspect of the subject to be covered. Judicial authorities have consistently enunciated this fact. The admiralty jurisdiction conferred by the Colonial Courts of Admiralty Act 1890 (Imp.) on State Supreme Courts and the High Court "is the same as the jurisdiction of the High Court in England - only such jurisdiction of the High Court in England as existed at the time of the passing of the Imperial Act."<sup>44</sup> Thus in 1890, apart from the statutory jurisdiction exercisable under the Admiralty Court Acts (Imp.), 1840 and 1861, the High Court of England had certain inherent jurisdiction built up like the common law by judicial precedent over the years.<sup>45</sup> The latter jurisdiction is recognised to have existed in three areas. First, the High Court of Admiralty claimed an ancient and inherent jurisdiction over wrongs committed on the high seas to or by British subjects. Due to prohibitions from the Common Law Courts in England, the jurisdiction was confined to certain causes arising outside the body of a county, i.e. on the high seas.<sup>46</sup> Second, the inherent jurisdiction was exercised by proceedings in rem instituted to enforce maritime liens which had attached to the res.<sup>47</sup> Its exercise invariably led to the formulation of important rules which apply to determine the order of priority among competing

43. Navigation Act 1912-73 (Comth.), s. 333, as amended.

44. The Ship Loretta v. Bubb [1971] 18 F.L.R. 141, p. 142.

45. Ibid., pp. 142 and 145, per Neville, J.

46. Union Steamship Company of New Zealand v. Ferguson (1967) 119 C.L.R. 191, p. 198. Barwick, C.J., held that the Port of Burnie could not be regarded as enclosed waters of Tasmania. Hence he ruled that the respondent's injury had occurred on the high seas. This fact was essential if the High Court was to exercise jurisdiction in admiralty in respect of the claim: ibid., pp. 208-209. See also Colonial Courts of Admiralty Act 1890 (Imp.), s. 2 (4).

47. Considered in Chapter Seven.

maritime liens and other claims. These rules, as we have seen, are non-statutory and continue to operate as part of the laws of Britain and Australia. Third, there is evidence that prior to the enactment of the Admiralty Court Act 1840 (Imp.), the High Court of Admiralty had entertained suits of possession. In Re Blanshard,<sup>48</sup> decided in 1823, Abott, C.J., acknowledged that the Court of Admiralty had "for a very long period of time" exercised jurisdiction to detain and take ships out of the possession or power of wrongdoers and restore them to the owners.<sup>49</sup> Sir W. Scott made it clear in his judgment that the "dispossession of a master is in its nature, not an uncommon proceeding".<sup>50</sup> He emphasised, however, that where a master was also a part-owner his conduct must have been reprehensible before he could be removed. It is therefore reasonable to assume that the powers of a Colonial Court of Admiralty established under the 1890 Act (Imp.) would embrace similar aspects of inherent jurisdiction.

## VI. REFORMS

### 1. Development in English Admiralty Law

Attention is now focussed on the discrepancies between the admiralty jurisdictions of Australian and English courts. Judicial authorities have categorily ruled that the Colonial Courts Admiralty Act 1890 (Imp.) has conferred on courts set up thereunder the admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed. "Neither the early history of the overseas Courts, the course of modern legislation, continuity of policy, nor practical convenience...require that the jurisdiction defined in the Act shall be declared to be that 'from time to time existing' in the High Court in England."<sup>51</sup>

48. (1823) 2 B. & C. 244, 248.

49. Admiralty Court Act 1840 (Imp.), s. 4.

50. The New Draper (1802) 4 Ch. Rob. 287, 290. It was later expressly incorporated in the Acts: Merchant Shipping Act 1854 (Imp.), s. 240; 1894 Act (Imp.), s. 472; Navigation Act 1912-73 (Comth.), s. 385, as amended by Navigation Amendment Act 1980 (Comth.), s. 98.

51. The Yuri Maru The Woron [1927] A.C. 906, p. 915, per Lord Merrivale. See also Zelling, J., "Of Admiralty and Maritime Jurisdiction" (1982) 56 A.L.J. 101.

Legislative trends in the United Kingdom, both before and after 1890, show a significant departure from the pattern of Australian admiralty law. Way back in July 1868, the County Courts Admiralty Jurisdiction Act (U.K.) was passed to empower County Courts in England to entertain, inter alia, claims for necessities and damage to cargo.<sup>52</sup> Except for the limit imposed as to amount in each case, the jurisdiction of County Courts over these causes was exercisable without the prerequisites to be met for similar claims under the Admiralty Court Acts (Imp.), 1840<sup>53</sup> and 1861.<sup>54</sup> Under the County Courts Admiralty Jurisdiction Amendment Act 1869 (U.K.),<sup>55</sup> for the first time in legal history, the competence of County Courts was extended to cover several new causes. These included any claim arising out of an agreement relating to the use or hire of a ship and any claim relating to the carriage of goods in any ship or in tort in respect of goods carried in any ship. The claims could be enforced by proceedings in rem or in personam.<sup>56</sup> Where the amount involved exceeded £300 and also on other grounds, the causes could, by order, be transferred to the High Court of Admiralty for hearing and determination. In Co-operative Dried Fruit Sales Pty. Ltd. v. The Ship "Terukawa Maru",<sup>57</sup> it was contended that the claim arose under an agreement in relation to the carriage of goods in a ship. It was argued that the action was one which, by reason of an order made under the 1868 Act (U.K.), would come within the jurisdiction of the High Court of Admiralty, and so would fall within section 2 of the Colonial Courts of Admiralty Act 1890 (Imp.). The reasons given by Menzies, J., for rejecting the argument confirmed the wider competence of the Courts in England. He said:<sup>58</sup>

"The short answer...is that any jurisdiction conferred upon the High Court of Admiralty by the County Courts Admiralty Jurisdiction Act of 1868 is limited to a cause originating in a county court having admiralty jurisdiction and the present action is not one of that description. The County Courts Admiralty Jurisdiction Acts do not confer the jurisdiction upon the Court of Admiralty...to determine claims

52. 31 & 32 Vic., c. 71, s. 3 (2) and (3).

53. S. 6.

54. S. 5.

55. 32 & 33 Vic., c. 51, s. 2.

56. Ibid., s. 3.

57. [1972] 46 A.L.J.R. 357. The action was brought for damages for non-delivery of goods contracted to be carried in a ship.

58. Ibid., p. 357.



arising out of agreements made in relation to the carriage of goods in ships generally, but only when such claims have been commenced in the county courts and transferred by an appropriate order."

Minor exceptions apart, the County Courts Act 1959 (U.K.)<sup>59</sup> which gave a historic boost to the admiralty jurisdiction of County Courts was modelled on the Administration of Justice Act 1956 (U.K.).<sup>60</sup>

As an introduction to a more detailed study to follow, the growth of admiralty jurisdiction of the High Court of Admiralty is outlined. Subject to certain exceptions,<sup>61</sup> in terms of the new heads of jurisdiction conferred, section 5 (1) of the Administration of Justice Act 1920 (U.K.) was to the High Court what section 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869 (U.K.) was to County Courts. Section 22 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.)<sup>62</sup> consolidated the existing provisions on the subject and extended the jurisdiction with respect to two new causes. Accordingly, section 22 (1) (ix) covered claims in respect not only of ship mortgages duly registered under the Merchant Shipping Acts (Imp.), 1894 to 1923, but also of any ship mortgage, or the proceeds thereof, under the arrest of the court. The expression "claims for damage" in section 22 (1) (a) was to be construed as extending to claims for loss of life or personal injuries.<sup>63</sup>

The Administration of Justice Act 1956 (U.K.) was a landmark in the maritime policy of the United Kingdom. It was a major legislative effort to enable the High Court to come to grips with the problems of maritime law. Ships were rendered more vulnerable to arrests and proceedings in rem by creditors and other claimants. The jurisdiction was enlarged to cover claims in respect of pilotage,<sup>64</sup> general average act,<sup>65</sup> bottomry<sup>66</sup> and virtually all types of mortgage or charge,<sup>67</sup> and also any claim for the forfeiture or condemnation of a ship or any goods involved, for the restoration of the same after seizure or for droits of admiralty.<sup>68</sup> A significant feature

59. 7 & 8 Eliz. II, c. 22.

60. 4 & 5 Eliz. II, c. 46.

61. 10 & 11 Geo. V, c. 81, s. 5 (1) (i) and (ii).

62. 15 & 16 Geo. V, c. 49.

63. See Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), s. 22 (2).

64. S. 1 (1) (l).

65. S. 1 (1) (q).

66. S. 1 (1) (r).

67. S. 1 (1) (c) and (4) (c).

68. S. 1 (1) (s).

of the 1956 Act (U.K.) was the implementation as law of the United Kingdom many of the provisions of the 1952 Arrest Convention.<sup>69</sup> It is interesting to note that Part I of the 1956 Act (U.K.), which introduced the changes described, set in motion the passing of similar legislation in a number of British Commonwealth countries, e.g. Singapore,<sup>70</sup> Malaysia<sup>71</sup> and New Zealand.<sup>72</sup>

Except for several sections<sup>73</sup> which do not concern us, the Supreme Court Act 1981 (U.K.) came into force on 1st January, 1982.<sup>74</sup> Sections 20 to 24 are mainly consolidating provisions. They restate English admiralty law in a coherent and logical manner. Several of the changes are designed to accommodate and reinforce recent legislative measures against oil pollution as a major hazard. Section 21 (4) has, in certain cases, removed restrictions on proceedings in rem against a "sister" ship by implementing to a greater extent the provisions of the 1952 Arrest Convention.

## 2. Proposed Heads of Jurisdiction in Admiralty Act

The admiralty jurisdiction of Australian Courts, derived from Imperial legislation, has remained largely static since 1890.<sup>75</sup> It is widely recognised that reforms in Australian admiralty law are long overdue. What is uncertain is whether they should be along the lines, or go beyond the scope, of the Supreme Court Act 1981 (U.K.).

69. See also s. 3 (4).

70. High Court (Admiralty Jurisdiction) Act, Cap. 6, Singapore Statutes, Rev. Ed. 1970.

71. Courts of Judicature Act 1964 (Mal.). By s. 26, every Malaysian High Court shall have the same jurisdiction and authority in relation to matters of admiralty as the High Court of Justice in England under Administration of Justice Act 1956 (U.K.).

72. Admiralty Act (No. 119 of 1973) (N.Z.).

73. I.e. ss. 72, 143 and 152 (2) which came into force earlier, i.e. on 28th July, 1981.

74. As to extent of repeal of Administration of Justice Act 1956, see Supreme Court Act 1981, Schedule 7.

75. Noted supra.

Our focus now is on the changes to be introduced based on the work of the Australian Law Reform Commission.<sup>76</sup> We shall consider how far the gaps and anomalies, which have been highlighted in Australian admiralty law, will be rectified under the proposed Act, as an overhauling measure.

In many, though not all, respects the Draft Admiralty Bill<sup>77</sup> shares the features and philosophy of the Supreme Court Act 1981 (U.K.). For the purpose of comparative study, references are made to provisions in both. The object is to ascertain whether, in addition to dealing with the defects and anomalies, the Draft Admiralty Bill seeks to confer further jurisdiction on Australian Courts.

### 3. Proprietary Maritime Claims

(1) Claim to possession or ownership of a ship or to the ownership of any share therein. The Draft Admiralty Bill has adopted the wording of section 20 (2) (a) of the Supreme Court Act 1981 (U.K.) with the addition of "title to"<sup>78</sup> before "or ownership of a ship." The addition brings it closely into line with Article I paragraph I (o) of the 1952 Arrest Convention. It will obviously strengthen the position of the court when dealing with title rights to a ship acquired in equity<sup>79</sup> or contract,<sup>80</sup> under a will, by transmission or as a result of a court declaration.

Section 20 (2) (a) of the Supreme Court Act 1981 (U.K.), on which the proposed head is based, has an ancient history. It embodies the inherent jurisdiction originally exercised by the Court of Admiralty in removing ships out of the hands of wrongdoers and restoring them to rightful owners.<sup>81</sup> In fact, it incorporates the

76. The documents produced include the following: Research Paper No. 1 - An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction (1984); Research Paper No. 2 - Admiralty Jurisdiction in Australia: The Courts Exercising Original and Appellate Jurisdiction (1984); Research Paper No. 3 - Draft Legislation: Admiralty Procedure and Rules (1985).

77. See Research Paper No. 3 - Draft Legislation: Admiralty Procedure and Rules (1985).

78. Clause 4 (2) (a) (i) and (ii).

79. Shipping Registration Act 1981 (Comth.), s. 47; Merchant Shipping Act 1894 (U.K.), s. 57.

80. In Batthyany v. Bouch (1881) 50 L.J.Q.B. 421, an agreement in writing to transfer a ship was held to be enforceable.

81. See Halsbury's Laws of England (4th ed.), op. cit., vol. 1, para. 313; Re Blanshard (1822) 2 B. & C. 244.

provisions of several Acts (Imp.) on the subject,<sup>82</sup> thus extending the jurisdictional competence of the Court. Where a person, who has no title to a ship, gets her registered in his name, the Court is empowered to compel him to re-transfer her to the rightful owner, even though no fraud is committed.<sup>83</sup> We have seen that in The Nicaraguan Barque Courier,<sup>84</sup> the Vice-Admiralty Court of South Australia had exercised such power in restoring the ship to the rightful owner.

Section 385<sup>85</sup> of the Navigation Act 1912-73 (Comth.), based on a similar Imperial provision,<sup>86</sup> confers on Australian courts the power to remove masters of ships. Unfortunately, it does not go far enough. Australian courts invested with admiralty jurisdiction do not possess the power as given in section 30 of the Merchant Shipping Act 1894 (Imp.). It seems that, under the Navigation Act 1912-73 (Comth.) in its present form, a person cannot be restrained or prohibited by court order, for any length of time, from dealing with any ship, or shares therein, by selling or mortgaging the same or transferring the ship out of the registry.<sup>87</sup> This gap may be filled by inserting in the Navigation Act (Comth.) an amendment which corresponds to section 30 of the Imperial Act. It is desirable for the power to be couched in general terms, or to be exercisable in conjunction with this proposed head of jurisdiction.

Without this proposed head, Australian courts will be unable to adjust effectively disputes arising between co-owners. For example, a similar power was conferred by section 8 of the Admiralty

82. Admiralty Court Act 1840 (Imp.), s. 4; Admiralty Court Act 1861 (Imp.), s. 8; Vice-Admiralty Courts Act 1863 (Imp.), s. 10 (9).

83. Holderness v. Lamport (1861) 29 Beav. 129. In Brond v. Broomhall [1906] 1 K.B. 571, it was held that, by virtue of its inherent jurisdiction, the court had power to rectify the register by ordering the entry of a void transfer to be expunged.

84. (1879) 13 S.A.L.R. 124.

85. As amended by the Navigation Amendment Act 1980 (Comth.), s. 98.

86. Merchant Shipping Act 1894 (Imp.), s. 472; 1854 (Imp.), s. 240.

87. Beneficial Finance Corporation Ltd. v. Farrer-Price (1964) 82 W.N. (N.S.W.) (Part I) 337.

Court Act 1861 (Imp.). In The Nelly Schneider<sup>88</sup> an action by the minority co-owners was instituted against a British ship. The plaintiffs alleged, inter alia, that accounts relating to the ownership and earnings of the vessel were outstanding and unsettled between them and the managing owner. Although the sale was opposed by the majority of the co-owners, Sir Robert Phillimore held that the court had a discretionary power under section 8 to order the sale of a ship proceeded against. A related problem between co-owners necessitating the use of such power is exemplified in The Hereward.<sup>89</sup> The majority of the co-owners of a ship transferred their shares to a newly-formed limited company. In an action of restraint, the minority co-owners sought a court order under section 8 for the appraisement and sale of the ship. Bruce, J., found for the minority co-owners as plaintiffs. In his view, the majority of the co-owners had no right to change the character of the ship without the consent of all persons concerned. Here in the general interests of the parties concerned, the discretionary power was exercised in making the order which enabled the majority co-owners to take up the shares of the minority.

That as a result of the struggles between the Common Law Court judges and those of the High Court of Admiralty the subject of charterparties fell outside the admiralty law of Australia has been noted. It is absolutely essential that under the proposed Admiralty Act all types of charterparties are covered. In demise or bareboat charters, the charterers as pro hac vice owners appoint the master and crew on board and have possession and control of the ship. Under this proposed head, an Australian admiralty court should have jurisdictional competence to deal with matters relating to the control, possession and ownership of the ship.

(2) Claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship. Clause 4 (2) (b) of the Draft Admiralty Bill differs from section 20 (2) (b) of the Supreme Court Act 1981 (U.K.) in two ways. The inclusion of the word "owner-ship" before "possession" is in conformity with Article I paragraph 1 (p) of the 1952 Arrest Convention. A new aspect relating to the working, manning or possibly navigation of the ship is introduced by

88. (1878) 3 P.D. 152.

89. [1895] P. 284.

the insertion of the word "operation" before the phrase "or earnings of the ship." Its reference to ship operation as a modern-day terminology serves to update the court's jurisdiction. Otherwise the meaning of "employment" will have to be strained to cover new situations. The overall advantage is that Australian courts will be empowered to adjudicate upon the wide-ranging claims and disputes arising between co-owners in relation to their ship. It is noteworthy that under English law most issues affecting ownership, whether involving third parties or co-owners, are determined under the preceding head.

Apparently, the wording of section 20 (2) (b) of the Supreme Court Act 1981 (U.K.) has been adopted in order to re-arrange or simplify the provisions of section 8 of the Admiralty Court Act 1861 (Imp.). Even before the Admiralty Court Acts (Imp.), 1840 and 1861, the High Court of Admiralty had asserted its authority by arresting and detaining a ship on the application of a co-owner who objected to her intended employment. In the action, he could compel the other co-owners to furnish security to the full value of the ship for her safe return.<sup>90</sup>

The growing need to extend the ancient authority of the Court by section 8 of the Admiralty Court Act 1861 and its beneficial effects were borne out in a number of decisions. It is interesting to note how Court of Admiralty judges, in their zeal to ensure that no wrongs would go without redress, construed the scope and intent of the section. In The Idas,<sup>91</sup> a part-owner of a British ship alleged that his co-owner, the ship's master, had rendered false accounts. He petitioned the court to order an account to be taken in respect of the earnings of the ship, the disbursements incurred and the money received under insurance policies effected on the ship and freight. The ship was lost before the date fixed for the Admiralty Court Act 1861 (Imp.) to come into force. It was held that section 8, being remedial, was retrospective and therefore gave court the jurisdiction.

90. The Appollo (1824) 1 Hag. Adm. 306; for enforcement of security, see Degrave v. Hedges (1707) 2 Ld. Raym. 1285; sub nom Grave v. Hedges, Holt K.B. 470.

91. (1863) Brown & Lush. 65; 2 New Rep. 45.

The right to institute a suit under this proposed head should not depend on the plaintiff's continuing to remain a part-owner. The necessity of exercising this aspect of the jurisdiction is exemplified in The Lady of The Lake.<sup>92</sup> The plaintiff part-owner of a ship had sold his share therein to a third party. He brought an admiralty suit in rem to have an account taken between himself and the defendant in respect of the employment and earnings of the ship during the period when he and the defendant were co-owners. The High Court of Admiralty held that it had the jurisdiction to entertain the suit although, when the action was instituted, the plaintiff was no longer a part-owner.

In Australia, the need to introduce this head jurisdiction is enhanced. It is true that property in an Australian ship, as in a British ship, may be divided into sixty-four shares. The Shipping Registration Act 1981 (Comth.) permits the maximum of sixty-four persons to be registered as owners of the ship, compared with the maximum of thirty-two persons under the Merchant Shipping Act 1894 (Imp.).

(3) Claim relating to a mortgage of a ship or of a share in a ship<sup>93</sup>  
Prior to the Admiralty Court Act 1840 (Imp.) being passed, the High Court of Admiralty was not empowered to adjudicate upon claims of mortgagees, which had to be dealt with by the Court of Chancery.<sup>94</sup> The jurisdictional incompetence resulted in duplicating proceedings, expense and, in some instances, injustice to litigants. For example, in an admiralty action in rem to recover wages, the ship might be sold under a decree of the Court. As the Court had no cognizance of mortgages, the surplus of proceeds would not be ordered to be paid to the mortgagee<sup>95</sup> but would remain in the registry, subject to any order that might be made or come to the Court.<sup>96</sup> Although under an Act of George IV,<sup>97</sup> passed in 1823, the modern concept of ship mortgage had emerged, the problems continued until the passing of the Admiralty Court Act 1840 (Imp.). The age-old Imperial policy, which prohibited foreigners from acquiring any property in

92. (1870) L.R. 3 A & E 29.

93. Draft Admiralty Bill, clause 4 (2) (a) (iii); see also clause 3 (1).

94. The Percy (1837) 3 Hag. Adm. 402.

95. At least where he has not taken possession of the ship.

96. The Portsea (1827) 2 Hag. Adm. 84.

97. 4 Geo. IV, c. 41, ss. 43 and 44; see Chapter Four.

British ships, operated to prevent the existence of any equitable interests in them or in any share therein. A logical outcome was to construe the jurisdiction over mortgage in section 3 in a rather narrow compass, confining it to statutory mortgages. Although the law relating to the mortgage of ships or shares therein as security had developed steadily over the years, the protection and rights enjoyed by mortgagees were strictly statutory. The High Court of Admiralty did not appear to have had admiralty jurisdiction over equitable mortgages or claims arising therefrom. This fact is sufficiently borne out by section 11 of the Admiralty Court Act 1861 (Imp.). It reads:

"The High Court of Admiralty shall have Jurisdiction over any Claim in respect of any Mortgage duly registered according to the Provisions of 'The Merchant Shipping Act, 1854', whether the Ship or the Proceeds thereof be under the Arrest of the said Court."

We noted that the anomalies traceable to the Imperial policy and the earlier legislation were removed by section 3<sup>98</sup> of the Merchant Shipping Act Amendment Act 1862 (Imp.). It is submitted that the plain literal wording of this section did not invest the High Court of Admiralty with jurisdiction in rem over claims arising out of equitable mortgages. If our submission is correct, the Colonial Courts of Admiralty Act 1890 (Imp.) does not empower Australian courts to entertain actions in rem to enforce claims founded on equitable mortgages.

Section 47 of the Shipping Registration Act 1981 (Comth.) corresponds to section 3 of the 1862 Act (Imp.). It is arguable that section 47, when read in conjunction with section 94A, is wide enough to confer on Colonial Courts of Admiralty in Australia jurisdiction in rem over claims relating to equitable and unregistered mortgages. Section 94A<sup>99</sup> provides that section 11 of the Admiralty Court Act 1861 (Imp.) "shall have effect...as if references in that section to a mortgage duly registered according to the provisions of the Merchant Shipping Act 1854, included references to a mortgage registered

98. 25 & 26 Vic. c. 63, s. 3 was passed so that "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other property."

99. Inserted by Shipping Registration Amendment Act 1984 (Comth.), s. 29.



or deemed to have been registered under this Act." There is another reason in support of this view. Unlike sections 34 and 35 of the 1894 Act (Imp.), sections 40 and 41 of the Shipping Act 1981 (Comth.), which provide for the rights of mortgagees, do not include the expression "registered mortgage". The omission of such words implies that holders of equitable or unregistered mortgages are also protected.

On the other hand, the words "mortgage registered or deemed to have been registered under this Act" have a restrictive effect. The jurisdiction of Australian courts does not extend to charges or mortgages created over ships or shares therein under foreign law.

The problem has been forestalled by a wide meaning given to "mortgage" in clause 3 (1) of the Draft Admiralty Bill. The definition includes "a hypothecation or pledge of, and a charge on, the ship or share,<sup>1</sup> whether at law or in equity<sup>2</sup> and whether arising under the law in force in a part of Australia or elsewhere." Its outstanding merit is its coverage of virtually every type of mortgage, whether effected under foreign law or Australian law. The facts of The Colorado,<sup>3</sup> decided by the English Court of Appeal, illustrate the wisdom of the Australian Law Reform Commission. In that case, the competing creditors were the Cardiff necessities men and a foreign bank claiming under a French hypothèque. By French law, claimants under a French hypothèque were mortgagees. In determining the order of priority, the English Court of Appeal recognised the French hypothèque, and held that the English necessities men ranked after the French hypothécaires.

The definition adopted by the Draft Admiralty Bill is wider in scope than its counterpart in the 1981 Act (U.K.).<sup>4</sup> It includes

1. The drafters seem to have incorporated some of the elements from the International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages, 1926, Article 3.
2. Equitable mortgages and interests can be created in a number of ways; see M. Thomas and D. Steel, Temperley Merchant Shipping Acts (7th ed. 1976), *op. cit.*, paras. 62 and 63. Cognizance should be taken of similar rights and interests created under foreign laws.
3. [1923] P. 102.
4. Supreme Court Act 1981 (U.K.), s. 20 (7) (c).

a pledge which differs from a possessory lien. The reason is that a pledgee has not only possession of the chattel delivered to him but also the power to sell on the pledger's default. The power must be in re aliena and the right conferred is of a hypothec character.<sup>5</sup>

In St Merriel,<sup>6</sup> Hewson, J., was correct in holding that the term "other charge" in section 3 (3) of the Administration of Justice Act 1956 (U.K.) did not include a possessory lien. Apparently, the term has the meaning given to the word "charge" as used in several provisions of the Merchant Shipping Acts (Imp.)<sup>7</sup> and the Navigation Act 1912-73 (Comth.).<sup>8</sup>

(4) Mortgage of a ship's freight. This proposed head in clause 4 (2) (iv) which is designed to confer jurisdiction in rem is a novel concept. Its origin is not found in any of the international conventions. Some initial difficulties may be encountered. Clause 3 (1) of the Draft Admiralty Bill defines "freight" to include "passage money and hire." It does not embrace demurrage<sup>9</sup> and damages for detention of a ship<sup>10</sup> payable by a charterer. The sections of the Shipping Registration Act 1981 (Comth.),<sup>11</sup> which provide for ship mortgage registration, do not extend to mortgage of freight.

The position of a freight mortgagee is governed largely by case law. Where a ship mortgagee takes possession of the ship, whether actual or constructive, he becomes entitled to "everything which represents the earnings of the ship which had not been paid before" that time.<sup>12</sup> On taking possession of the ship, a ship mortgagee's right to the freight cannot be defeated by an

5. See E.I. Sykes, The Law of Securities (3rd ed. 1978), op. cit., p. 549.

6. [1963] P. 247.

7. See 1894 Act (Imp.), s. 513 (2); 1906 Act (Imp.), ss. 35 (2) and 42 (1).

8. See ss. 128 (2), 163A (2) (d) and 289 (2).

9. For demurrage, see Sir A. Mocatta, M. Mustill and S. Boyd, Scrutton on Charterparties and Bills of Lading (19th ed. 1984), op. cit., pp. 305-330.

10. Ibid., pp. 306-310.

11. Ss. 38-47, as amended by Shipping Registration Act Amendment Act 1984 (Comth.), ss. 15 to 17.

12. Keith v. Burrows (1877) 2 App. Cas. 636, p. 646.

assignee of the freight. Provided that a ship mortgagee took his security without notice of the assignment,<sup>13</sup> it is immaterial that the assignment was made before the ship mortgage was registered.<sup>14</sup> It is submitted that under this proposed head a freight mortgagee should enjoy similar protection.

By the English rules of procedure a warrant of arrest against freight may be executed by serving the warrant on the cargo in respect of which the freight is payable or on the ship by which the goods are carried, or on both.<sup>15</sup> If, without notice of an existing freight mortgage, a cargo consignee pays the freight due over to the carrier or shipowner, it is submitted that the cargo concerned is not liable to arrest.

A freight mortgage is postponed to a maritime lien which is attached to the ship and freight. Moreover, it would appear that a freight mortgage is not within the meaning of "bill of sale"<sup>16</sup> and so such a mortgagee is not protected by the bills of sale legislation.

This proposed head has no parallel in the Supreme Court Act 1981 Act (U.K.). To remove doubts concerning the rights and the position of freight mortgagees, appropriate amendments should be made to the Shipping Registration Act 1981 (Comth.).

(5) Claim for satisfaction or enforcement of a judgment given against a ship or other property in a proceeding in admiralty by a court (including a court of a foreign country).<sup>17</sup> Jurisdiction under this proposed head may only be exercised if judgment in an action in rem, as distinct from an action in personam, has been obtained. A decision in rem determines the status of the res itself and "binds all persons claiming an interest in the property

13. Wilson v. Wilson (1872) L.R. 14 Eq. 32.

14. Brown v. Tanner (1868) L.R. 3 Ch. 597.

15. K. McGuffie, P. Fugeman and P. Gray, Admiralty Practice (1964 ed.), op. cit., para. 268.

16. See, e.g. Bills of Sale Act 1900 (Tas.) (64 Vic. No. 70), s. 4 (1), and also E.I. Sykes, The Law of Securities, op. cit., pp. 455 et. seq.

17. Draft Admiralty Bill, clause 4 (2) (c). By Draft Rules, Order 70 (1), where a ship or other property is under arrest, a person who has obtained a judgment in any court, Australian or foreign, may apply to the court to determine the order of priority of claims against the proceeds of sale.

inconsistent with the judgment even though pronounced in their absence.<sup>18</sup> Dicey and Morris have given a classic statement of the law in these words:<sup>19</sup>

"A judgment in rem is a judgment whereunder either (1) possession or property in a thing is adjudged to a person, or (2) the sale of a thing is decreed in satisfaction of a claim against the thing itself...Foreign judgments in rem are freely recognised in England but rarely call for enforcement."

We shall consider how the principle applies in relation to ships and other maritime property.

The head in clause 4 (2) (c) of the Draft Admiralty Bill gives expression partly to the residual jurisdiction as found in section 1 (1) of the Administration of Justice Act 1956 (U.K.), and partly to the dicta of Sir Robert Phillimore in The City of Mecca.<sup>20</sup> In an action brought in the Portuguese Tribunal of Commerce, the plaintiffs obtained judgment against the master and owners of a British vessel for damages for injury caused by collision to the plaintiffs' ship. Before the Portuguese judgment was satisfied, the ship had arrived in England. Due to a mistaken assumption that the judgment was in rem, Sir Phillimore found for the plaintiffs in an action in rem in the Admiralty Division against the ship on the unsatisfied judgment. He explained the reasons for allowing the action in these terms:<sup>21</sup>

"...it is the duty of one admiralty court, a duty arising from the international comity, to enforce the decree of another upon a subject over which the latter had jurisdiction...I am of the opinion that it is the duty of this Court to act as the auxiliary to the Portuguese Court and to complete the execution of justice, which owing to the departure of the ship, was necessarily left unfinished by that Court."

On appeal to the English Court of Appeal, Sir Robert Phillimore's decision was reversed on the ground that the Portuguese Court judgment was actually given in a personal action against the master and owners of the shipowner.<sup>22</sup> It is clear from the decision

18. Dulfus Mieg et Compagnia S.A. v. Bank of England [1949] 1 All E.R. 946, p. 957, per Jenkins, J.

19. J. Morris, Dicey and Morris on The Conflict of Laws (9th ed. 1973), op. cit., p. 1013.

20. (1879) 5 P.D. 28.

21. Ibid., pp. 32-33.

22. (1881) 6 P.D. 106.

that an English Court has the jurisdiction to, and generally will, enforce in an action in rem a foreign judgment if obtained in an action in rem.<sup>23</sup>

In the recent case of The Despina GK,<sup>24</sup> the dicta of Sir Robert Phillimore were applied. The plaintiffs' cargo carried on board the defendants' ship was lost. In an action in rem brought in a Swedish Admiralty Court, the plaintiffs had the ship arrested. She was released when the owners put up security. On the defendants' failure to pay in full the damages awarded, the plaintiffs issued a writ in the English Admiralty Court against the ship in England. To obtain satisfaction of the Swedish judgment in respect of the balance outstanding, the res had to be in the hands of the Court. The question arose whether the Court had jurisdiction to issue the warrant of arrest since she had already been arrested once and released after security was put up. Sheen, J., decided the question in the affirmative.

Under English admiralty law, a plaintiff's right to enforce, or to the satisfaction of, a foreign judgment depends on an important condition being met. For the action in rem to lie, the ship or presumably the cargo concerned must, at the time of the arrest or re-arrest, remain the property of the judgment debtor.<sup>25</sup> In The Alletta,<sup>26</sup> the plaintiffs sought to re-arrest a ship after judgment and after her sale to new owners. Mocatta, J., held that the plaintiffs' right was lost because the cause of action had become merged in the judgment. It is submitted that this rule will also apply to claims brought under clause 4 (2) (c) of the Draft Admiralty Bill. In this respect, a beneficiary of a judgment in rem is not in the same position as a maritime lienholder who can pursue the res into whosoever's hands it may pass.<sup>27</sup>

The principle relating to judgments obtained in proceedings

23. The same principle applies when a foreign judgment in rem is raised in defence; see Castrique v. Imrie (1870) L.R. 4 H.L. 414.

24. [1983] 1 All E.R. 1.

25. Ibid., The Despina G K, p. 5.

26. [1974] 1 Lloyd's Rep. 40.

27. Cf. D. Thomas, Maritime Liens (1980 ed.), op. cit., p. 330.

in rem extends to a decree for possession granted by a foreign court. It is followed as part of Australian jurisprudence.<sup>28</sup> In the Western Australian case of S.S. Pacific Star v. Bank of America National Trust and Savings Association,<sup>29</sup> the plaintiff claimed as mortgagee of the tug Pacific Star. In the action in rem brought against the tug in Hong Kong, the plaintiff obtained a decree for possession. When the tug later appeared in Western Australian waters, Negus, J., allowed the plaintiff's claim to possession based on the Hong Kong Court decree. The Full Court of the Supreme Court of Western Australia, sitting as a Colonial Court of Admiralty, dismissed the appeal on the ground that the decree was a foreign judgment given in an action in rem against the res. Accordingly, it qualified for recognition and enforcement.

A pre-1956 decision shows that the English Admiralty Court had exercised jurisdiction in circumstances envisaged by clause 4 (2) (c) even though the ship had not been arrested. In the interesting case of The Nautik,<sup>30</sup> a warrant of arrest and a writ had been issued. After she was served with the writ but before the warrant could be served, she was clandestinely taken out of the court's jurisdiction by the master who put her to sea. It was held that the court had jurisdiction, based on the service of the writ, to pronounce judgment in an action in rem. It is true that a judgment obtained in the absence of the res is of little practical value. If she puts into an Australian port, she can be arrested and the English court judgment can be enforced against her within clause 4 (2) (c).

For the sake of completeness, mention is made of another method of executing judgment obtained in an action in rem. In The Gemma,<sup>31</sup> the English Court of Appeal held that the owners of

28. As to the recognition and enforcement of foreign judgments in Australia, see E. Sykes and M. Pryles, International and Interstate Conflict of Laws (2nd ed. 1981), chapter 25.

29. [1965] W.A.R. 159.

30. [1895] P. 121.

31. [1899] P. 285.

the foreign vessel had rendered themselves personally liable by appearing in an action in rem. Certain advantages may avail shipowners who pursue this course of action, e.g. the benefit of limiting their liability, the defence of contributory negligence and so on. But if the amount of bail given for the release of the res proves insufficient to satisfy the judgment, payment of the balance may be enforced by a writ of fieri facias against the defendants' goods and also against the ship, even though she had been released previously, if she is within the court's jurisdiction.<sup>32</sup>

(6) Claims for interest in respect of a claim within clause 4 (2)

(a) - (c).<sup>33</sup> The concept is new in that it is not derived from the international conventions<sup>34</sup> or any of the Imperial legislation. No definition is given of the expression "interest in respect of a claim."<sup>35</sup> Apparently, it is not confined to the amount payable at a certain interest rate or per cent arising from a loan made on the security of a ship or her freight, or from a share of the ship's earnings.<sup>36</sup> It is arguable that the expression could embrace a right or benefit which arises under a contract, trust, assignment, will or a judgment in rem, whether obtained in an Australian or foreign court. Equally, in a representative capacity, a trustee-in-bankruptcy, a company liquidator or receiver may acquire and exercise similar rights. If the reasoning is correct, the expression will significantly increase the number of proprietary

32. The Despina G.K. [1983] 1 All E.R. 1 p. 5, per Sheen, J.

33. Draft Admiralty Bill, clause 4 (2) (d).

34. As to the lists of "maritime claims" recognised, see, e.g. International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1926, Articles 2 to 4; International Convention (of same name) 1967, Articles 1 and 4; International Convention relating to the Arrest of Seagoing Ships, 1952, Article I.

35. The word "interest" even in this context can have different meanings.

36. As to interest rate after judgment and interest on costs under English admiralty law, see K. McGuffie, P. Fugeman and P. Gray, Admiralty Practice (1964 ed.), op. cit., paras. 546, 584 and 585. Under Australian rules of court procedure applicable in admiralty, interests on debts are generally payable. E.g. the Supreme Court Civil Procedure Act 1932 (Tas.), s. 34, permits a maximum of seven per cent.

maritime claims.<sup>37</sup> The effect could be that any interest, whatever its nature, related to or derived from any of the claims, within clause 4 (2), thought not strictly qualifying as such, will suffice to found an action in rem against the ship.

Hence to prevent vexatious proceedings or abuse of process in rem particularly, Australian Courts exercising such jurisdiction may have to determine what "interest claims" are considered too remote. Heavy damages may have to be imposed for wrongful arrests.<sup>38</sup> A practical measure for shipowners, ship operators and agents to adopt under the proposed law is to file caveats against the arrest of their ships.<sup>39</sup> There is no prohibition against further caveats being filed.<sup>40</sup>

#### 4. General Maritime Claims

(1) Claim for damage done by a ship (whether by collision or otherwise).<sup>41</sup> We have seen that the words outside the brackets, as used in section 7 of the Admiralty Court Act, 1861 (Imp.), have often been given a wide meaning. The object is to provide in rem remedies in cases of personal injuries and damage, whether direct or indirect. Thus damage done by a ship to oyster beds<sup>42</sup> and submarine cables<sup>43</sup> has been held to come within the head. We have noted the isolated and somewhat doubtful decision of the Canadian Exchequer Court in Outhouse v. The "Thorshaun".<sup>44</sup> There the remoter consequences of jettisoning oil from a ship were held to be within the section. A number of serious limitations nevertheless remain.

37. For an explanation of the use of this term, see Research Paper No. 3 - Draft Legislation; Admiralty Procedure and Rules, op. cit., p. 32.

38. The matter seems to be well covered by Draft Admiralty Bill clause 35 (1). See Professor D.C. Jackson, Enforcement of Maritime Claims (1985), p. 168 and pp. 178-179.

39. Draft Admiralty Rules 1986, para. 6.

40. Ibid., para. 12.

41. Clause 4 (3) (a).

42. The Swift [1901] P. 168.

43. The Clara Killam (1870) L.R. 3 A. & E. 161.

44. [1935] 4 D.L.R. 628. Here damage was caused to lobsters by oil, being part of the ship's cargo, which had been pumped overboard.



The addition of the words "whether by collision or otherwise" in clause 4 (3) (a) of the Draft Admiralty Bill indicates that physical damage is not a requisite for the exercise of jurisdiction under this proposed head. A mere contact between two ships, without damage being caused to either, will not give rise to a right of action.<sup>45</sup> On the other hand, through the negligence or misconduct of the crews or master on board a vessel, another vessel may receive or cause damage.<sup>46</sup> The former may be held liable under this proposed head in an admiralty action *in rem*, even though there has been no actual collision or contact between the two vessels.<sup>47</sup> Apparently the words within brackets in clause 4 (3) (a) are intended to retain an appropriate part of the jurisdiction which has been split up under clause 4 (3) to enable claims to be brought under new heads.

The United Kingdom Parliament has adopted a different approach in the Supreme Court Act 1981 (U.K.). By statutory extension, it has built upon the broad construction given by English admiralty judges to the words "damage done by a ship." This head<sup>48</sup> now embraces any claim in respect of a liability incurred under the Merchant Shipping (Oil Pollution) Act 1971 (U.K.) and also that falling on the International Oil Pollution Compensation Fund in Part I of the Merchant Shipping Act 1974 (U.K.).

(2) Claim in respect of the liability of the owner of a ship arising under the Protection of the Sea (Civil Liability) Act 1981, Part II or IV, or under a law of a State or Territory mentioned in section 7 (1) of that Act.<sup>49</sup> In Chapter Five, we examined the various measures adopted and the penalties imposed by State and Commonwealth Parliaments to control, prevent and reduce pollution. There is only one instance under Commonwealth law where a ship may, by

45. The Margaret (1881) 6 P.D. 76.

46. As exemplified in Monte Ulia (Owners) v. Banco and Others (Owners) The Banco [1971] P. 137, the facts of which will be discussed in due course.

47. The Industrie (1871) L.R. 3 A. & E. 303.

48. Supreme Court Act 1981 (U.K.), s. 20 (5) (a) and (b).

49. Draft Admiralty Bill, clause 4 (3) (b).

ministerial authority, be detained until the amount due is paid or satisfactory security is furnished.<sup>50</sup> However, neither the international conventions on pollution given the force of law in Australia nor any State or Commonwealth legislation on the subject authorises proceedings in rem to be brought against the res for pollution damage caused or for the recovery of penalties imposed. The defects in the law dealing with pollution remain so long as only certain individuals, e.g. the owner and/or the master, can be held personally liable.

Like its counterpart in the Supreme Court Act 1981 (U.K.), clause 4 (3) (b) of the Draft Admiralty Bill is historic. It will lead to a new and important development in admiralty law. The admiralty jurisdiction in rem will be extended to claims based on strict liability and penalties imposed by the Protection of the Sea (Civil Liability) Act 1981 (Comth.) and also by State legislation in certain instances. The expressions "pollution damage" and "preventive measures" are widely defined.<sup>51</sup> Property owners, fishermen, pearl divers and tourist trade operators, who are adversely affected by pollution, may have incurred costs in taking preventive measures. It is submitted that they should be entitled to institute proceedings in rem against the ship concerned. It is unfortunate that the proposed admiralty jurisdiction does not extend the right of instituting such an action against the rest of the cargo of oil on board.

We have noted that State enactments, which deal with pollution, have given effect to the kernel provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil 1954. At present, it appears that no State enactment has given "the applied provisions of the Convention" the force of law within the meaning of section 7 (1) of the 1981 Act (Comth.). Those State enactments previously considered seem to be within the legislative competence of the State Parliaments. Apparently, the 1981 Act (Comth.) is intended to supplement the existing law in each State. Moreover, since the

50. Protection of the Sea (Civil Liability) Act 1981 (Comth.), s. 22 (1).

51. See Article I paras. 6 and 7 of 1969 Convention scheduled to the 1981 Act (Comth.).

Commonwealth Parliament has not by legislation stated, "completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter,"<sup>52</sup> it is submitted that the State enactments dealing with pollution are valid.

As noted previously, compliance with the measures imposed by State enactments to control, prevent and minimise pollution is secured in a number of ways. First, heavy penalties of up to \$50,000 may be imposed on the shipowner and the master for breach of certain provisions in the State enactments,<sup>53</sup> though the penalties incurred under the State enactments for environmental protection are less heavy.<sup>54</sup> Second, by the creation of the statutory tort the Authority concerned in each State is entitled to obtain indemnity in respect of the costs, expenses and liabilities incurred in clean-up operations and the preventive measures taken.<sup>55</sup> Third, property owners in New South Wales, Queensland and Victoria are protected by certain statutory remedies which impose strict liability on tanker owners and their masters. Certain property owners, who suffer "loss of or damage to any property" or incur "expense or liability in preventing or mitigating such loss or damage" are entitled to recover.<sup>56</sup> In these respects, the rights and interests of property owners are protected under the law in each of these States.

The penalties, statutory indemnity and claims of property owners arising under State legislation have effect in supplementing the civil and penal liabilities imposed under Parts II and IV of the 1981 Act (Comth.). It is desirable for this proposed head of jurisdiction to be extended so that the penalties and remedies provided by State enactments may be enforced by proceedings in rem against the tanker or ship concerned.

52. Ex parte McLean (1930) 43 C.L.R. 472, p. 483, per Dixon, J. There is no intention on the part of the Commonwealth Parliament to occupy the whole field so as to displace the State Parliaments in that area.

53. See Chapter Five.

54. For penal provisions, see State enactments discussed in Chapter Five.

55. See Chapter Five.

56. See Chapter Five.

(3) Claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment thereof. Clause 4 (3) (c) has subdivided the head of jurisdiction in section 20 (2) (f) of the Supreme Court Act 1981 (U.K.). The section involves a change in English admiralty law from the House of Lords decision in The Vera Cruz.<sup>57</sup> The proposed head, when given the force of Commonwealth law, will serve to remove the anomalies and jurisdictional limitations already highlighted.<sup>58</sup>

The subdivision has the advantage of clarity in focussing attention on any defect in a ship or her machinery as the causative factor. We saw that in Huddart Parker Ltd. v. Cotter,<sup>59</sup> a seaman's injuries were caused by the ship's defective equipment. In construing and applying section 59 of the Navigation Act 1912-73 (Comth.), the High Court judges differed in their views as to whether the provision was intended to supplement or supersede the contractual duty of care implied at common law. The difficulty will no longer exist in future. The words used in clause 4 (3) (c) are wide enough to embrace any fault or danger in the static or altered condition of any part, machinery or apparatus of a ship. They should extend to unseaworthiness<sup>60</sup> and liability arising from any unsafe structure or premises in a ship. At common law, the seaworthiness requirement is a strict non-delegable obligation.<sup>61</sup> Suppose that a ship's winches or machinery are negligently repaired by an independent contractor rendering the ship unseaworthy. Injuries caused to any person, whether on board or outside the ship, as a result of the unseaworthy condition should come within the meaning of clause 4 (3) (c).

The legislative objective is to enlarge the category of

57. (1884) L.R. 10 C.P. 59.

58. See Chapter Six, Part II, dealing with injuries to seamen.

59. (1942) 66 C.L.R. 624.

60. *Ibid.*, p. 637, per McTiernan, J., in his dissenting judgment. By the Navigation Act 1912-73 (Comth.), s. 59, obligation as to seaworthiness of the ship is implied in every contract of employment and instrument of apprenticeship relating to the sea.

61. In relation to goods carried, see Clifford v. Hunter (1827) M. & M. 103.

claimants in proceedings in rem. Loss of life<sup>62</sup> or personal injuries may, as a result of the unsafe condition of the ship or her appliance, be suffered by any of the crew members, passengers, visitors or stevedores on board, or by any person outside the ship. Clause 4 (3) (c), when implemented, will fill many of the gaps existing in Australian admiralty law despite the wide construction consistently placed by judges on section 7 of the Admiralty Court Act 1861 (Imp.). Thus loss of life or personal injuries, though not caused by a ship as an active instrument as exemplified in The Thefta,<sup>63</sup> can under this proposed head found an action in rem against the ship. In that case, the plaintiff sustained personal injuries through falling down into the ship's hold because the hatchway was covered only with a tarpaulin. The action in rem seeking damages was dismissed for want of jurisdiction. It was held that the damage was not "done by any ship" within the meaning of section 7.

An important reform needed relates to seamen's claims for loss of life and personal injuries arising under the Seamen's Compensation Act 1911 (Comth.)<sup>64</sup> and the various State workmen's compensation enactments.<sup>65</sup> We have noted that the 1911 Act (Comth.)<sup>66</sup> and the Western Australian Act<sup>67</sup> make limited provision for enforcing compensation payments by ordering the detention of the ship concerned. It is suggested that this proposed head of jurisdiction should be extended to encompass claims arising under the 1911 Act (Comth.) and any State workmen's compensation legislation. The change suggested will confer on seamen and other workmen associated with the shipping industry wider protection.

62. As under English law, the right to recover damages for loss of life is statutory: Compensation to Relatives Act 1897 (N.S.W.), s. 3; Common Law Practice Act 1867 (Qld.), s. 12; Wrongs Act 1958, Part III (Vic.), s. 16; Wrongs Act 1936, Part II (S.A.), s. 19; Fatal Accidentals Act 1959 (W.A.), s. 4; Fatal Accidents Act 1934 (Tas.), s. 4.

63. [1894] P. 280.

64. See Chapter Six. In The Molliere [1925] P. 27, Roche, J., held that statutory compensation paid for loss of life was not within the admiralty jurisdiction.

65. See Chapter Six.

66. S. 13 (1).

67. By the Workers' Compensation and Assistance Act (W.A.) (No. 86 of 1981), s. 179, a District Court may, in certain circumstances, by order direct the bailiff to detain the ship.

Clause 4 (3) (c) is not entirely related to the provisions on limitation of liability under the Navigation Amendment Act 1979 (Comth.).<sup>68</sup> The owner of a sea-going ship may limit his liability for "loss of life or personal injury caused to any person carried in the ship" unless it is the result of the actual fault or privity of the owner.<sup>69</sup> Situations may occur where a person, e.g. a visitor, port official or stevedore, though lawfully on board, is strictly "not carried in the ship." If he loses his life or suffers personal injuries as a result of any defect in the ship or her equipment, it is arguable that the claim may not be limitable under the 1979 Act (Comth.).

Moreover, since the loss of life or personal injuries are not caused by collision but by a ship's defect, the matter will fall outside the 1910 Convention.<sup>70</sup> The statutory defence of contributory negligence as provided under the law of each State may apply.<sup>71</sup>

(4) Claim for loss of life, or for personal injury caused by an act or omission of -

- (i) the owner or charterer of a ship;
- (ii) a person in possession or control of a ship; or
- (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable,  
being an act or omission in the navigation or management  
of the ship, including an act or omission in connection with  
—
- (iv) the loading of goods on to, or the unloading of goods from, the ship;
- (v) the embarkation of persons on to, or the disembarkation of persons from, the ship; and
- (vi) the carriage of goods or persons on the ship.

68. S. 65 amending Navigation Act 1912-73 (Comth.), Part VIII.

69. 1957 Convention, Article I, para. 1 (a).

70. International Convention for the Unification of certain Rules with respect to Collision; as to statutory effect given, see Navigation Act 1912-73 (Comth.), ss. 259-261 and s. 396; Maritime Conventions Act 1911 (U.K.).

71. Law Reform (Miscellaneous Provisions) Act (N.S.W.) (No. 32 of 1965), s. 10; Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act (Qld.) (1 Eliz. II No. 42) s. 10, Wrongs Act (S.A.) (No. 2267 of 1936), s. 27a; Tortfeasors and Contributory Negligence Act (Tas.) (No. 14 of 1954), s. 4; Wrongs Act (Vic.) (No. 6420 of 1958), s. 26; Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act (W.A.) (No. 23 of 1947), s. 4.

This proposed head in clause 4 (3) (d) and the preceding head combined will cover about the same ground as section 20 (2) (f).<sup>72</sup> It is significant that, apart from certain exceptions, clause 4 (3) (d) is modelled on Article I paragraph 1 (b) and Article 6 paragraph 2 of the 1957 Convention,<sup>73</sup> relating to the limitation of liability for loss of life and personal injuries. This proposed head of jurisdiction is only exercisable where the wrongful act or default of any of the persons named in paragraphs (i) to (iii) occurs in the navigation, management or any of the operations mentioned in paragraphs (iv) to (vi). The two key words "navigation" and "management" are not defined anywhere in the Draft Admiralty Bill or the Navigation Act 1912-73 (Comth.).

Guidance as to their meaning may have to be sought from judicial pronouncements in cases on limitation of liability and bill of lading contracts. In The Warkworth,<sup>74</sup> the issue before the English Court of Appeal concerned the meaning of the words "improper navigation" in section 51 (4) of the Imperial Act.<sup>75</sup> Fry, L.J. endorsing the dictionary meaning of the word "navigation" used by Dr. Phillimore, said:<sup>76</sup>

"[O]ne of the definitions there given is that navigation is the science or art of conducting a ship from place to place through the water; if that be true it includes the supply of such instruments as are proper for the ship, and such men as are skilled in their calling...If either of them are wanting, and a collision happens, then we have a case of improper navigation. The words may include other cases...."

Brett, M.R., and Bowen, L.J. favoured a broader proposition. In their view, "all damage wrongfully done by a ship to another whilst it is being navigated" would come within the words provided the wrongful action of the ship was due to the negligence of the

72. Supreme Court Act 1981 (U.K.).

73. Given effect by the Navigation Amendment Act 1979 (Comth.), s. 65 (1).

74. (1884) 9 P.D. 145.

75. 25 & 26 Vic., c. 63.

76. (1884) 9 P.D. 145, p. 148.

shipowner or those for whom he is responsible.<sup>77</sup> Baihache, J.,<sup>78</sup> and Wright, J.,<sup>79</sup> had held that the word "navigation" referred to a ship in motion, or being cast off. In The Vigilant,<sup>80</sup> a ship came in to collision with a pier and received damage. The cause was the improper casting off of the tow rope by the tug. Sir Henry Duke, President of the Probate Division, held that this negligent act was improper navigation within the meaning of section 503 of the Merchant Shipping Act 1894 (Imp.).

Further light is thrown on the meaning of "navigation" by American decisions relating to contracts of carriage. Thus, failure to have a damage caused by perils of the sea repaired at a port of refuge,<sup>81</sup> disregard of storm warnings when commencing voyage,<sup>82</sup> neglect to take careful notice of a light upon a reef,<sup>83</sup> and improper selection of a place to anchor<sup>84</sup> were held to be faults of navigation.

Provided that the wrongful act or default is committed in the navigation of a ship, the Court should have jurisdiction to entertain the claim. It is immaterial whether the death or personal injury occurs on board the wrongdoing ship, or is caused by the wrongdoing ship to someone on a wharf or on board another ship. A ship may be so negligently navigated as to run into another ship or cause a mounting swell which engulfs a small craft. A claim for loss of life<sup>85</sup> or personal injury as a result of the collision or sinking in such circumstances should come within this proposed head.

Despite the wide compass given judicially to "navigation", it does not embrace certain acts done in relation to, or for the purpose of, assisting a ship. The facts of the Alde<sup>86</sup> are interesting.

77. Ibid., pp. 146-148.

78. Lord (S.S.) (Owners) v. Newsum, Sons and Co. Ltd. [1920] 1 K.B. 846.

79. Svenssons v. Cliffe S.S. Co. [1932] 1 K.B. 490, p. 500.

80. [1921] P. 312.

81. Carsar v. Spreckels (1905) 141 Fed. Rep. 260 (C.C.A.).

82. Hanson v. Haywood (1907) 152 Fed. Rep. 401.

83. The E.A. Shores (1896) 73 Fed. Rep. 324.

84. The Etona (1896) 64 Fed. Rep. 880; 71 Fed. Rep. 895.

85. As has been stated, this right to claim damages for loss of life due to a wrongful act or default is statutory.

86. [1926] P. 211.



An action was brought to limit the liability based on the tonnage of the barge Alde. Damage was caused when she forced another barge, the Tom tit, onto the propeller of the steamship Ascania. There was doubt whether any assistance to the forward movement, of the Alde, which caused the damage, was received by the person in charge of her from some men working on a capstan on another stationary vessel. Bateson, J. laid down an important exception in the following words:<sup>87</sup>

"The navigation is that of the vessel which is being moved, and not of the implement which is stationary, either on a ship or on shore, whether it is made to revolve by steam or used by hand."

Hence the improper use of a capstan on a stationary vessel did not constitute an improper navigation on the part of that vessel for her to be held jointly and severally responsible for the damage. In fact, the negligence of individuals in carrying out their tasks, whether on board the ship in question or some other ship, may not be related to navigation. Unless the wrongful acts resulting in a loss of life or personal injury occur in circumstances within the meaning of this head, no action in rem can be brought.

A further limit to the meaning of "navigation" is set by the decision in The Tojo Maru,<sup>88</sup> which has been considered elsewhere. The House of Lords held that the firing of a Cox bolt gun, which negligently set off an explosion and caused extensive damage to the ship being salvaged, was not an act "in the navigation or management" of the tug. Moreover, the act was not an activity performed on board the salvors' tug.

The meaning of the words "management of the ship" was considered in connection with the limitation of liability in The Athalvic tor.<sup>89</sup> A tanker with three sea valves negligently left open by the plaintiffs' servants arrived at Lagos. When the appropriate valves were opened to discharge cargo through the port pipe line, some sixty tonnes of petrol escaped from the ship into the sea. The petrol on water became ignited, causing a quantity of depth charges on the admiralty trawlers to explode. A number of persons in

87. Ibid., p. 215.

88. [1971] 1 All E.R. 1110, supra.

89. [1946] P. 42.

the ships and on shore lost their lives or suffered injuries. Pilcher, J., had no difficulty in rejecting the argument on behalf of the tanker-owners that the negligence of the tanker's personnel constituted "improper navigation". He analysed the legislative intention of introducing those words "management of the ship" in section 1 of the Merchant Shipping Act 1900 (Imp.).

The purpose was to cover acts of negligence by shipowners' servants in the management of the ship's furnances or in the handling of dangerous cargo which might do damage to other ships, cargo and property on shore. He took the words "in their very broadest and popular sense" to include the many duties of the ship's master and officers in relation to the safety of the cargo and the well-being of the passengers. The words "management of the ship" were held to be wide enough to cover negligence of which the owners' servants were guilty.

The learned judge rightly refused to follow the more limited construction given to those words when used in exception clauses and contracts of carriage of goods.<sup>90</sup> Under the repealed Carriage of Goods by Sea Act 1924 (U.K.),<sup>91</sup> a fine distinction is drawn between "management of the ship" and cargo care.<sup>92</sup> The provisions relating to cargo care imposes on the carrier a strict obligation which must be fulfilled to protect the interests of cargo owners. The words within quotes are necessarily given a restricted sense to include "any part of the ship or any operation with regard to the ship as a whole, which is carried out for the ship's purposes and not merely in relation to cargo."<sup>93</sup>

90. In the Harter Act 1893 (U.S.), s. 3 contains these words "...faults or errors in the management of the ship."

91. And also the Sea-Carriage of Goods Act 1924-73 (Comth.).

92. Gosse Millerd, Ltd. v. Canadian Government Merchant Marine [1929] A.C. 223, where the House of Lords affirmed the judgment of Wright, J., as reported in [1927] 2 K.B. 432, p. 435; see also Foreman and Ellams, Ltd. v. Federal Steam Navigation Co. [1928] 2 K.B. 424, pp. 437 and 439, per Wright, J.

93. Gosse Millerd, Ltd. v. Canadian Government Merchant Marine [1929] A.C. 223, pp. 238-241, per Lord Sumner.

The broad interpretation adopted by Pilcher, J., will no doubt include the restricted meaning given to those words as used in the Hague Rules. It therefore covers management of the ship's machinery and appliances which are fitted for the purposes of both the ship and cargo.<sup>94</sup>

To the already vast sphere covered by the two terms "navigation" and "management" are added the operations mentioned in paragraphs (iv) to (vi) of clause 4 (3) (d). The object is to provide a remedy in virtually every instance where death or personal injury is wrongfully caused.

In essence, clause 4 (3) (d) gives strong recognition to the personality of the ship by making her answerable for the wrong or default of each of the persons named in paragraphs (i) to (iii). Unfortunately, the word "owner" is not defined in the Draft Admiralty Bill. It should include an owner of a foreign ship, an unregistered owner,<sup>95</sup> an equitable owner,<sup>96</sup> and possibly a person holding majority shares in a ship.<sup>97</sup> A "person in possession" embraces a demise charterer, a ship's mortgagee who has taken possession of her, whether it is actual or constructive,<sup>98</sup> a shipyard owner when the ship is under repair,<sup>99</sup> a bailee and a salvor in certain instances. In the literal sense, a ship's master, who has charge on board, has control of the ship. It appears that the position remains unchanged even where a pilot, who is on board, has the conduct of the ship. The reason is that the pilot is subject to the authority of the master who is not relieved from responsibility for the conduct and navigation of the ship.<sup>1</sup> Where a ship is being towed, the tug may be under the control of the person in charge of the tow and vice versa, depending on the circumstances of the case. An agent who is given wide authority as to the employment of the ship may be deemed to have sufficient control of her within the meaning of clause 4 (3) (d) (ii) and (iii).

94. The Athalvictor [1946] P. 42.

95. Shipping Registration Act 1981 (Comth.), s. 14.

96. Ibid., s. 47.

97. Ibid., s. 11, which provides that the property in an Australian ship shall be divided into sixty-four shares.

98. Rusden v. Pope (1868) L.R. 3 Ex. 269.

99. A shipwright has a possessory lien on the ship for payment due for work done: Williams v. Allsupp (1861) 30 L.J.C.P. 353.

1. Navigation Act 1912-73 (Comth.), s. 410B.

One aspect of vicarious liability should be mentioned. It is true that stevedores, who undertake to load and unload cargo, act as independent contractors and do not have possession or control of the ship. They carry out the work under the control and direction of the ship's master or officer. If, during the stevedoring operations, someone is killed or injured because of improper supervision or default by the ship's master or officer, it is probable that a claim under this proposed head will lie.

It is submitted that this proposed head should be enlarged to embrace seamen's claims arising under the Seamen's Compensation Act 1911 (Comth.) and various State workmen's compensation enactments.

(5) Claim for damages (including a claim for damages for economic loss)....<sup>2</sup> The jurisdiction to be conferred under this proposed head will remedy a number of defects in common law if actions in tort for purely economic loss, e.g. loss of profit, are allowed. Here we are concerned with situations where no physical loss of or damage to property has occurred. It will be recalled that, as a policy of English common law, the tort of negligence does not provide a remedy for a wrong resulting in purely economic loss.<sup>3</sup> No difficulty, however, would arise if there is, in addition to economic loss, physical loss or damage as well.<sup>4</sup>

An epoch-making exception to the general rule of English common law is made by the decision in Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad".<sup>5</sup> Although as a result of damage negligently caused to an oil-carrying pipeline purely economic loss was suffered by the plaintiff, who did not own the pipeline, the High Court unanimously found for him on the special facts of the case. Unless the scope of this decision is enlarged, entailing a change in substantive law, few claims for purely economic loss could

2. Clause 4 (3) (da).

3. D. Partlett, "Recovery of Economic Loss for Negligence in Australia" (1980) 9 Syd. Law Rev. 121; P.F. Cane, "Recovery for purely Economic Loss in Australia" (1977) 93 L.Q.R. 333; S. Thomson, "Negligence and Economic Loss" (1977) 40 M.L.R. 714.

4. See case where the plaintiffs succeeded in claiming for loss of profit and damage to machinery: S.C.M. (U.K.) Ltd. v. W.J. Whittall & Son Ltd. [1970] 3 All E.R. 245 (C.A.).

5. (1976) 51 A.L.J.R. 270.

be brought under this proposed head. Justice would be denied to innocent third parties who are victims of negligence. The anomaly is exemplified by Societe Anonyme de R.A. Helice v. Bennetts.<sup>6</sup> When the plaintiffs' tug was engaged under a contract in towing a ship, the defendant's steamship negligently collided with and sank the tow. The collision did not cause any damage to the plaintiffs' tug or her equipment. The plaintiffs failed in their action to recover as damages the amount of towage remuneration which they would have earned if they had completed the towage operation. The reason was that the loss of such remuneration was not damage to the plaintiffs that was the direct consequence of the defendant's servants so as to be recoverable in law.

This gap in the law is further highlighted by the facts of Margarine Union G.m.b.H. v. Cambay Prince Co. Ltd.<sup>7</sup> The plaintiff accepted delivery orders. At the port of discharge, the copra which was shipped in bulk was separated according to the quantities stated in the delivery orders. Owing to the defendant shipowners' fault, the copra had been seriously contaminated by cockroaches during the voyage. In the action by the plaintiffs as holders of delivery orders, judgment was given for the shipowners. The court held that the plaintiffs were not owners or entitled to possession of the goods when the damage in question occurred. The fact that the risk of loss or damage was assumed by the plaintiffs was insufficient for the purpose. In effect they were unable to recover for an antecedent tort or for purely economic loss.

It is felt that this proposed head of jurisdiction could be the answer in situations where the damage or loss sustained has resulted from an indirect cause. Illustrations may be drawn from the facts of the two historic Privy Council decisions.<sup>8</sup> Due to the spillage of fuel oil from a ship, extensive fire damage was caused to a wharf and four ships. The oil spillage was the result of negligence or default on the part of the demise charterers' servants in the management of the ship. It is submitted that the

6. [1911] 1 K.B. 243.

7. [1969] 1 Q.B. 219.

8. I.e. The Wagon Mound (No. 1) [1961] A.C. 388; The Wagon Mound (No. 2) [1967] A.C. 617; see also Chapter Five.

owners of the wharf and the four ships damaged by fire should be able to institute proceedings in rem against the ship from which the spillage occurred.

Unlike the Supreme Court Act 1981 (U.K.)<sup>9</sup> and its predecessors,<sup>10</sup> the Draft Admiralty Bill does not provide a head for claims for "damage received by a ship." To prevent a serious gap in the jurisdiction, it is desirable to construe this proposed head broadly. The purpose is to provide relief where the loss or damage suffered is not directly caused by another ship as "the active cause". A good example of damage done by a ship as an indirect cause is furnished by The Minerva.<sup>11</sup> The elevator barge had completed discharging a grain cargo from the holds of the Norwegian steamship Minerva. Due to the negligence of the shipowners' servants in handling and using the ship's gear and to faults in such gear, the wire on the derrick broke. The ship's elevator and gear fell together, damaging the elevator barge, her deck and her equipment. Bateson, J., allowed the appeal. He held that, as the plaintiffs' barge had received damage and as parts of the defendants' ship had caused it, the action in rem was rightly brought. Alternatively, the claim could be brought under clause 4 (3) (da) as the damage sustained was connected with the discharge operation.

At common law, actions in public nuisance may be brought to recover damages in certain situations. Where special or particular damage is proved, e.g. as a result of obstruction by or pollution from a ship, a claim for purely economic loss should be allowed under the proposed head.<sup>12</sup>

(6) Claim in the nature of salvage (including life salvage).<sup>13</sup> We have seen that under the statutes of Richard II salvage on the high seas was one of the areas reserved for the High Court of

9. S. 20 (2) (e).

10. Administration of Justice Act 1956 (U.K.), s. 1 (1) (d); Admiralty Court Act 1840, s. 6.

11. [1933] P. 224.

12. See P.F.P., Higgins, Elements of Torts in Australia (1970), op. cit., pp. 360-361.

13. Draft Admiralty Bill, clause 4 (3) (e). Cf. Supreme Court Act 1981 (U.K.), s. 20 (2) (j) which extends to salvage under the Civil Aviation Act 1949 (U.K.).

Admiralty.<sup>14</sup> Thus with regard to salvage on the high seas this Court was able to exercise an exclusive jurisdiction, and to develop salvage law according to the dictates of public policy. In The City of Chester,<sup>15</sup> Sir William Brett, M.R., observed that the "large equity of Admiralty law" left the matter of salvage award very much at large and almost entirely in the discretion of the court. In explaining the role of the Court, Street, J., pointed out that it looked "not merely to the exact quantum of the services to be performed but to the general interests of navigation and commerce of the country, which are generally protected by exertions of this nature."<sup>16</sup>

Since the statutes of Richard II, there had been many historic developments in the nature and extent of the jurisdiction conferred on the High Court of Admiralty. For the first time, it was empowered by section 6 of the Admiralty Court Act 1840 (Imp.) to adjudicate upon salvage claims whether the services arose within the body of a county or upon the high seas. The Wreck and Salvage Act 1846 (Imp.)<sup>17</sup> consolidated and amended the previous legislation on salvage. It invested the High Court of Admiralty with jurisdiction in broad terms by supplementing section 6 of the Admiralty Court Act 1840 (Imp.). Many of the uncertainties previously encountered were removed. Section 40 of the 1846 Act (Imp.) gave the Court a wide-ranging jurisdiction to decide upon "all claims and demands whatsoever in the nature of salvage services performed...whether in the case of ships or vessels, or of any goods or articles either at sea or cast upon the shore and whether such services shall have been performed upon the high seas or within the body of any county." There were some doubts as to whether section 19 created a jurisdiction with regard to life salvage. When the law was later expanded by

14. See Chapter One.

15. (1884) 9 P.D. 182, p. 187.

16. North Coast Steam Navigation Co. v. The Ship "Eugene" (1909) 9 N.S.W.S.R. 246, p. 250.

17. (1846) 9 & 10 Vic., c. 99.

legislation to cope with the new facets of this fast-growing maritime business, a different approach to the problem of jurisdiction had to be found. Many aspects of the Wreck and Salvage Act 1846 (Imp.) were consolidated and enlarged in the Merchant Shipping Act 1854 (Imp.) to give effect to what appears to be a new salvage policy. The latter Act (Imp.) conferred jurisdiction on the High Court of Admiralty in respect of claims for the salvage of life from any ship or boat provided that the services were rendered within the limits of the United Kingdom.<sup>18</sup> Section 9 of the Admiralty Court Act 1861 (Imp.) signified a further change in legislative policy towards life salvage. It rendered all the provisions of the 1854 Act (Imp.) relating to life salvage applicable to the salvage of life from any British ship or boat in any port of the world.

Australian colonies benefited from the developments in Imperial salvage law. Under the Vice-Admiralty Courts Act 1863 (Imp.), Imperial courts in the colonies were empowered in general terms to adjudicate upon claims for the "salvage of any ship, or of life of goods therefrom."<sup>19</sup> The move was part of the process for elevating the Vice-Admiralty Courts to the level of the High Court of Admiralty. The object was achieved - as we have noted - under the Colonial Courts of Admiralty Act 1890 (Imp.).

In re-organising the Admiralty Courts in her Majesty's Dominions, the Imperial Parliament appeared to have liberalised its life salvage policy. It implied that in appropriate cases payments out of the Mercantile Marine Fund<sup>20</sup> could be made for the salvage of life in British waters and from British ships anywhere in the world even though the claims were actually dealt with by a Colonial Court of Admiralty, e.g. in Australia. However, no award out of the British Mercantile Marine Fund could be made in respect of the salvage of life from non-British ships in Australian waters.<sup>21</sup> By reason

18. See ss. 458 and 460.

19. S. 10 (4).

20. Merchant Shipping Act 1854 (Imp.), s. 459; 1894 Act (Imp.), s. 544 (3).

21. See 1854 Act (Imp.), s. 458; 1894 Act (Imp.), s. 544 (1). As to reward for purely life salvage, see Navigation Act 1912-73 (Comth.), s. 315, being first introduced by Navigation Act (Comth.) (No. 36 of 1958), s. 157.



of the Interpretation Act 1889 (U.K.),<sup>22</sup> the repeal of the 1854 Act (Imp.) and the re-enactment of similar life salvage provisions in the Merchant Shipping Act 1894 (Imp.) will leave intact the jurisdiction conferred under section 9 of the Admiralty Court Act 1861 (Imp.). Today Australian courts administer salvage law based on jurisdictions derived from Imperial Acts<sup>23</sup> and Commonwealth legislation.<sup>24</sup> In consolidating the salvage provisions of the 1854 Act (Imp.) the Merchant Shipping Act 1894 (Imp.) has, in many instances, failed to include Colonial Courts of Admiralty as the competent tribunals for administering salvage law. So far as Australian courts are concerned, the difficulties were removed when the Navigation Act 1912-73 (Comth.) re-enacted with modification the salvage provisions of the 1894 Act (Imp.). Section 565 has been reproduced almost verbatim as section 328 of the Commonwealth Act.<sup>25</sup> It empowers every State Supreme Court, including every Court in a State having admiralty jurisdiction, to entertain "all claims whatsoever relating to salvage, wherever the services...were performed, and wherever the wreck...is found."

Section 405A of the Navigation Act 1912-73 (Comth.) is a re-enactment of section 29 of the Crown Proceedings Act 1947 (U.K.). It does not authorise proceedings in rem in respect of any claim against the Commonwealth or a State, or the arrest, detention or sale of a ship, cargo or other property belonging to the Commonwealth or a State. However, in exceptional circumstances, the court may permit proceedings in rem, which have been instituted, to continue as proceedings in personam against the Commonwealth, a State or some person designated by court.

22. By section 38 (1), where any Act passed after the Interpretation Act 1889 "repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall...be construed as references to the provisions so re-enacted."

23. E.g. Admiralty Court Act 1840 (Imp.), s. 6; Admiralty Court Act 1861 (Imp.), s. 9; Colonial Courts of Admiralty Act 1890 (Imp.).

24. Navigation Act 1912-73 (Comth.), Part VII.

25. As amended by Navigation Amendment Act 1980 (Comth.), s. 88; see also Navigation Act 1912-73 (Comth.), Part VII on wrecks and salvage.

At present, there is no Commonwealth legislation which expressly protects salvors against the consequences of their negligence.<sup>26</sup> The House of Lords decision in The Tojo Maru<sup>27</sup> indicates that situations could exist where the liability of salvors may be limited. The limitation of liability under the Navigation Act 1912-73 (Comth.), as amended,<sup>28</sup> may apply where the loss or damage caused is the result of negligence in the management or navigation of a salving tug or the default of any person on board the tug.

It is submitted that this proposed head should be construed to cover two broad aspects of salvage. The first aspect concerns claims by salvors who have rendered services in preventing or reducing spillage of oil or other noxious substances from any ship or tanker. In making the award, the Court should also assume jurisdiction in considering the extent and nature of the pollution damage averted and the clean-up expenses avoided. The second concerns not only the issue of salvorial negligence but also salvors' right to limit their liability in certain circumstances.

(7) Claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise.<sup>29</sup> Except for the inclusion of carriage of persons, this proposed head resembles section 20 (2) (h) of the Supreme Court Act 1981 (U.K.). This widely-worded draft provision has the advantage of covering most claims arising out of contracts of carriage, even though no physical loss or damage is caused to the goods carried or to be carried.

Under this proposed head, passengers may recover damages for breach of contract of carriage. Thus a breach may arise if

26. Cf. Merchant Shipping Act 1979 (U.K.), Schedule 4, Part I, Article 2 para. 1 (a) and (c).

27. [1971] 1 All E.R. 1110.

28. Navigation Amendment Act 1979 (Comth.), s. 65 (1).

29. Clause 4 (3) (f) as to claims for actual physical loss or damage, see the next head.

there is failure to provide the services undertaken or unreasonable delay in the ship's departure.. It appears that, for an action in rem to be brought, it is immaterial whether the breach of contract or act of negligence is committed by the shipowner, carrier, charterer or an employee of any such person.<sup>30</sup>

A bill of lading endorsee for value will usually suffer loss by acting in reliance on the bill of lading statements that the goods are shipped in apparent good condition when in fact they are not. At common law, a shipowner or carrier, who issues a clean bill of lading in a fraudulent manner, will be estopped by admissions contained therein.<sup>31</sup> Also situations may be envisaged where goods delivered to a shipowner or carrier are shipped only after undue delay, forwarded to the wrong destination or delivered after an unjustified deviation in the voyage.<sup>32</sup> It is submitted that the breach committed or loss inflicted by the shipowner or carrier in such circumstances should entitle cargo claimants to institute proceedings in rem under this proposed head.

The The St Elefterio,<sup>33</sup> the English court had to construe the scope of section 1 (1) (h) of the Administration of Justice Act 1956 (U.K.), which is re-enacted in section 20 (2) (h) of the 1981 Act (U.K.). The facts are rather unusual. For a cargo of cattle cake put on board, the charterer received bills of lading which were wrongly antedated. The charterer, as shipper, sold and endorsed in blank the documents to the plaintiffs who in turn resold them to the purchasers. Upon discovering that the goods were not in fact shipped on the dates specified in the bills of lading, the purchasers rejected the goods. In an attempt to recover the loss expected to arise,

30. It is submitted that the action will lie where an agreement is breached even though no goods are actually shipped or no persons are carried physically.

31. At times a shipowner or carrier is willing to issue to a shipper a clean bill of lading even though the goods are not in good condition provided the shipper gives him an indemnity against any claim by the endorsee of the bill of lading: Silver v. Ocean S.S. Co. [1930] 1 K.B. 416.

32. As to consequences of unjustified deviation, see Sir A. Abraham, M. Mustill and S. Boyd, Scrutton on Charterparties and Bills of Lading (19th ed. 1984), op. cit., pp. 259-267; 452-454.

33. [1957] P. 179.

the plaintiffs, as one-time holders of the documents, brought the action in rem against the ship. In giving judgment for the plaintiffs, Willmer, J., took a broad view of the words of section 1 (1) (h) of the 1956 Act (U.K.). He held that they were wide enough to cover claims arising out of any agreement relating to the carriage of goods in a ship, whether such claim was founded on contract or tort.

The wording of the proposed head is capable of dealing with most of the problems faced by Australian cargo importers. Proceedings in rem may be instituted by cargo claimants, irrespective of whether they are holders of bills of lading, combined transport documents or merely shipping receipts.<sup>34</sup> It is immaterial whether the cargo loss or damage occurs on an in-coming or out-going ship. The anomaly highlighted in F. Kanematsu and Company Ltd. v. The Ship "Shahzada"<sup>35</sup> will be eliminated.

We now turn to the second limb of the draft provision, viz. "agreement relating to the use or hire of a ship." Its scope, as explained in several cases, tends to be comprehensive. In The Queen of the South,<sup>36</sup> the plaintiffs, as watermen, instituted an action in rem against the ship to recover £290 for services rendered to her in the River Thames. It was established that under the agreement between the plaintiffs and the ship's managers services were rendered by the use of the former's motor boats suitably manned for the work to be done. Under section 8 (1) of the Administration of Justice Act 1956 (U.K.), a "ship" included a motor boat. Brandon, J., held that the plaintiffs' claim was well founded within section 1 (1) (h) of the Act.

In The Conoco Britannia,<sup>37</sup> Brandon, J., refused to construe the meaning of the words "relating to the use or hire of a ship" merely in terms of the carriage of goods in a ship. He held that

34. See Chapter Six. In The Ship "Marlborough Hill" v. Alex, Cowan and Sons Ltd. [1921] 1 A.C. 444, the Privy Council held that a document acknowledging receipt of goods for shipment was a bill of lading within the meaning of Admiralty Court Act 1861 (Imp.), s. 6. It would probably be held otherwise if it was found that none of the goods had in fact been received on board.

35. (1956) 30 A.L.J. 478, p. 482, per Taylor, J., supra.

36. [1968] P. 449.

37. [1972] 2 All E.R. 238.

the words in the ordinary and natural sense are "amply wide enough to cover the case of the hire of a tug under a towage contract."<sup>38</sup> If the decision is good law, there is an overlap between this proposed head and clause 4 (3) (j).<sup>39</sup>

The second limb of the draft provision, if adopted, could redress an unusual defect in the law as disclosed in the Queensland case of Larsen v. The Ship "Nieuw Holland".<sup>40</sup> The ship arrived at the port of Brisbane. After the termination of her employment as shopkeeper on board, the plaintiff was prevented by customs officers and ship's officers from removing certain plant, equipment and stock-in-trade belonging to her. In her action against the ship and her owner claiming the return of the goods or the sum of £2,195, a writ was issued but was later set aside. The appeal to the Full Court of the Supreme Court of Queensland was dismissed on the ground that the Court had no jurisdiction to entertain the claim. In the single judgment delivered by Philip, J., the words "goods carried in any ship" in section 6 of the Admiralty Court Act 1861 (Imp.) were held to refer "only to goods carried as cargo,"<sup>41</sup> as to which the shipowner has a duty as carrier. His view is correct in that it was not the Legislature's intention to allow a passenger, or person in the plaintiff's situation, to bring an action *in rem* where her camera or chattels were detained. It appears that the plaintiff's claim could come within the second part of the proposed head.

(8) Claim for loss of, or damage to, goods carried by a ship.<sup>42</sup> This is in substance a re-statement of part of section 2 (1) of the County Courts Admiralty Jurisdiction Amendment Act 1869 (U.K.). For Australia, the enactment of this draft provision is imperative. The wording has a number of distinct advantages to offer. Provided that the goods lost or damaged have in fact been put on board or

38. Ibid., p. 242.

39. Clause 4 (3) (j) corresponds to Supreme Court Act 1981 (U.K.), s. 20 (2) (k).

40. [1957] St. R. Qd. 606.

41. Ibid., p. 615.

42. Clause 4 (3) (g), *in pari materia* with Supreme Court Act 1981 (U.K.), s. 20 (2) (g). The term "goods", however, is defined in s. 24 (1) to include "baggage".

shipped, a cargo-owner should be able to invoke the in rem jurisdiction. It is immaterial that the contract of carriage is not evidenced by a bill of lading but by some other shipping document. Equally irrelevant is the consideration that the cargo loss or damage has occurred on board a ship while sailing out of an Australian port or that one or more of her owners are domiciled in Australia. The anomalies of the law as highlighted by the unjust decisions in Co-operated Dried Fruit Sales Pty. Ltd. v. The Ship "Terukawa Maru"<sup>43</sup> and The Victoria<sup>44</sup> will be rectified.

This proposed head has other advantages. It will give effect to the classic reasoning on which the decision of the Full Court of the Supreme Court of New South Wales in J. Gadsden Pty. and Another v. Australian Coastal Shipping Commission<sup>45</sup> was based. Although by Article III rule 6 of the Hague Rules scheduled to the Sea-Carriage of Goods Act 1924-73 (Comth.), the claim of the plaintiffs, as cargo consignees, was time-barred, they were permitted to enforce their right founded on tort by proceedings in rem. The sound reasoning applied there will be strengthened by the draft provision when enacted as law.

In today's maritime business, ships are often chartered or sub-chartered to different persons. The draft provision has a wide scope. Irrespective of whether the immediate charterer or the sub-charterer is the carrier under the contract of carriage made with any shipper, a cargo claimant should be entitled to institute proceedings in rem against the carrying ship. This right should apply despite the express inclusion of the shipowner in the definition of

43. [1972] 46 A.L.J.R. 357, supra.

44. (1887) 12 P.D. 105. This decision has exemplified a notorious inadequacy of the Admiralty Court Act 1861 (Imp.), s. 7. It was held that the court had no jurisdiction to entertain an action in rem by cargo owners against the carrying ship for damage caused to goods by her negligent collision. The damage caused was not regarded as "damage" within the meaning of s. 7.

45. (1977) 31 F.L.R. 157, supra.

"carrier". It is very likely that the same reasoning will hold under the Hamburg Rules. It should be immaterial whether the carrier or actual carrier is also the shipowner himself. The word "carrier" in Article 1 rule 1 and the term "actual carrier" in Article 1 rule 2 are not defined to include the shipowner.<sup>46</sup>

The meaning of the words "carried in a ship" is decisive where the loss or damage occurs while the goods are in a lighter or barge before being loaded on board the carrying ship or after their discharge from such a ship. It is submitted that where the lighter or barge is provided by the carrier in fulfilment of the contract of carriage the loss or damage is deemed to have been sustained by the "goods carried in a ship". A lighter or barge, "not ordinarily propelled by oars only," will come within the meaning of section 6 (1) of the Navigation Act 1912-73 (Comth.). The facts of the Hague Rules case of East and West Steamship Company v. Hossain Brothers<sup>47</sup> are relevant. After the bales of cotton had been discharged from the tackle of the carrying ship into a lighter provided by the carrier, they were damaged by rainwater. The carrier was held liable for the damage sustained on the ground that the lighter without a fixed roof was unseaworthy for the carriage of tea. The cargo claimant should be allowed to bring an action in rem against the carrying ship, as the lighter was of little value.

(9) Claim in respect of general average.<sup>48</sup> In Birkley v. Pregrave, Lawrence, J., is wellknown for his pronouncement couched in these words:<sup>49</sup>

"All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested."

The definition of "general average act" as adopted by both the

46. United Nations Commission on International Trade Law Year-book, (1978), vol. IX, p. 212; for definition of "carrier" in the Hague Rules, see Article 1 (a).

47. [1968] 2 Lloyd's Rep. 145.

48. Clause 4 (3) (h).

49. (1801) 1 East 220, p. 238.

United Kingdom's and Commonwealth legislation on marine insurance<sup>50</sup> is identical. A clear meaning of the term is presented in Rule A of the York-Antwerp Rules 1974 which are often incorporated into contracts of carriage.<sup>51</sup>

For reasons of legal history, general average law was administered as part of common law.<sup>52</sup> Just over three decades ago, claims for general average contributions fell outside the English Admiralty Court. The inclusion of the "general average" claim in section 1 (1) (g) of the Administration of Justice Act 1956 (U.K.) was due largely to the United Kingdom's adoption of the 1952 Arrest Convention.<sup>53</sup>

In practice, however, there will be little need for suits to be instituted under this proposed head. Where any extraordinary sacrifice involving cargo or any part of the ship is made, or any general average expenses are incurred during the voyage, the shipowner has a possessory lien on the goods saved for general average contributions due.<sup>54</sup> He will be able to detain the goods until adequate security, e.g. a Lloyd's average bond or bank guarantee, has been furnished by the owners.<sup>55</sup> The security is given as an undertaking by cargo owners to pay their share of general average contribution when the adjustment is completed. Moreover, at common law, a shipowner is bound to exercise his authority for the protection of all merchants, including himself, entitled to receive contributions.

50. Marine Insurance Act 1906 (U.K.) (6 Edw. VII, c. 41), s. 66 (1) and (2); Marine Insurance Act 1909-73 (Comth.), s. 72 (1) and (2).

51. Rule A is a re-enactment of its 1950 predecessor. See Sir A. Mocatta, M. Mustill and S. Boyd, Scrutton on Charterparties and Bills of Lading (19th ed. 1984), *op. cit.*, pp. 276-288. For further information on the subject, see generally Lowndes and Rudolf, General Average (10th ed. 1975).

52. Pirie & Co. v. Middle Dock Co. (1881) 44 L.T. 426, p. 429, *per Williams, J.*

53. Article 1 (1) (g).

54. Crooks v. Allan (1879) 5 Q.B.D. 38. This lien was held to prevail over the claim under an earlier respondentia bond: Cargo Ex Galam (1863) 2 Moo. P.C. (N.S.) 216.

55. See N. Hudson, "New Forms for General Average Security", [1977] 4 L.M.C.L.Q. 501; J. Crump, "General Average, Salvage and the Contract of Affreightment", [1985] 1 L.M.C.L.Q. 19.



There is another reason why shipowners rarely need to invoke this proposed head of jurisdiction. Since the goods carried are usually covered by quasi-negotiable bills of lading, they may change hands after the general average sacrifice or loss has occurred. The persons liable for contribution are owners of the goods saved at the time of such a sacrifice or loss.<sup>56</sup> However, it appears that purchasers to whom the goods are subsequently assigned will only be answerable for the contribution if the bills of lading contain an appropriate contractual stipulation to that effect. It is submitted that, irrespective of whether or not the liability to contribute is transferred to subsequent purchasers, shipowners are able to enforce payment of the contributions by exercising their possessory lien.

This proposed head will undoubtedly be of benefit to cargo owners who are entitled to general average contributions. At common law, they may sue the shipowner or the other cargo owners.<sup>57</sup> But common law proceedings could be abortive. Often the shipowner may not be within the court's jurisdiction. The subsequent cargo purchasers, as bill of lading holders, may not be liable to contribute. These problems can be overcome if a general average claimant is able to institute proceedings *in rem* against the ship and the goods on board which are liable to contribute.

(10) Claim in the nature of towage of a ship.<sup>58</sup> An identical provision first appeared in section 6 of the Admiralty Court Act 1840 (Imp.). It applied whether the services were rendered within the body of a county or on the high seas. Today, towage agreements are often entered into based on the United Kingdom Standard Conditions.<sup>59</sup> A towage may turn out to be more onerous than expected at the time of the contract. For instance, the vessel towed may be much larger than at first understood, or extra work in the nature of salvage has to be performed. These factors could change the character of the services rendered from towage to salvage.<sup>60</sup> If both towage and

56. Hain S.S. Co. v. Tate & Lyle (1936) 41 Com. Cas. 350.

57. Strang v. Scott (1889) 14 A.C. 601.

58. Clause 4 (3) (j).

59. See e.g. Federal Steam Navigation Co. Ltd. v. J. Fenwick & Co. Pty. Co. (1943) 68 C.L.R. 553.

60. The "Cartella" v. The "Inverness Shire" (1916) 21 C.L.R. 387. In The Leoborg [1962] 2 Lloyd's Rep. 146, it was held that a claim in the nature of towage extended to escorting services provided by a tug from outside a port into a port.

salvage operations are alleged to have been performed, it would obviously be necessary to split the claims so that they can be brought under the appropriate heads, i.e. in clause 4 (3) (e) and (j).

Today it is common for parts of oil rigs, building structures, dredges, beacons, drilling machinery, diving and exploration gear and other equipment to be strapped onto water-borne platforms. These weight-bearing floats are transported across water by towing. It is submitted that Australian courts should be invested with admiralty jurisdiction to entertain claims involving the towage of such objects, even though they are not ships.<sup>61</sup>

(11) Claim for the pilotage of a ship<sup>62</sup> It seems strange that jurisdiction over "claims in respect of pilotage" was conferred under the Vice-Admiralty Courts Act 1863 (Imp.)<sup>63</sup> though not given under the Admiralty Court Acts (Imp.), 1840 and 1861. A plausible explanation is that in early law both towage and pilotage were treated by the High Court of Admiralty as giving rise to maritime liens.<sup>64</sup> As it purportedly had jurisdiction over such claims, legislative provision was not regarded necessary. Vice-Admiralty Courts, on the other hand, had to be expressly invested with the jurisdiction in order to enforce payment of dues imposed by colonial enactments for compulsory pilotage in the ports and harbours.<sup>65</sup> At present, marine boards and harbour authorities in Australia are empowered by State legislation to require the use of, and payment for, pilotage services provided in the districts under their jurisdiction.<sup>66</sup> For a claim to

61. For definition of "ship", see Draft Admiralty Bill, clause 3 (1); cf. Supreme Court Act 1981 (U.K.), s. 24 (1).

62. Clause 4 (3) (k).

63. S. 10 (3).

64. See D. Thomas, Maritime Liens (1980), op. cit., pages 16-17.

65. See, e.g. Shipping and Pilotage Consolidation Ordinance (18 Vic. No. 15) (W.A.), ss. 7 and 8; Marine Board and Navigation Act 1881 (S.A.), Part V. As to the history of English Pilotage law, see G.K. Green and R.P. Douglas, The Law of Pilotage (2nd ed. 1983), chap. 1.

66. Express provisions are found in the Marine Act 1976 (Tas.), Part XII; Marine Act 1958 (Vic.), Part V Div. 3; Queensland Marine Act 1958, Part VIII; Shipping and Pilotage Act (W.A.) (No. 17 of 1967). The Navigation Act 1912-73 (Comth.), s. 410 B deals with the liability of the master and owner of the ship while under pilotage.

be brought under this proposed head, it should not be necessary for compulsory pilotage services to have been rendered. Probably what is required is that a pilot has been employed on a ship to direct her course in or out of a port or harbour in some way.

(12) Claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied to a ship for its operation or maintenance. This proposed head in clause 4 (3) (m) is broader in scope than sections 4 and 5 of the Admiralty Court Act 1861 (Imp.) taken together, and also section 20 (2) (m) of the Supreme Court Act 1981 (U.K.). The onerous conditions to be met in sections 4 and 5 of the 1861 Act (Imp.) are no part of the draft provision.

We saw that by adopting a wide construction for "necessaries" Australian judges were able to give effect to a larger number of the claims of materials men.<sup>67</sup> However, jurisdiction should not be confused with the underlying principle of law. Although a great variety of things supplied to ships<sup>68</sup> are capable of qualifying as necessities, no suit in rem can be successfully brought unless the shipowner, as distinct from the charterer, is liable to pay for them.<sup>69</sup> Another requirement to be met is that the goods or materials must have been supplied for the operation or maintenance of the ship. Obviously provisions for crew, stores, medical supplies<sup>70</sup> and whatever engine parts required to render the ship seaworthy would generally come within the rule.

The term "services" will embrace a range of operations relating to cargo, viz. loading, stowing, discharge, transhipment and

67. Christie v. The Ship "Karu" (1927) 27 S.R. (N.S.W.) 443, p. 446; Lewmarine Pty. Ltd. v. The Ship "Kaptayanni" [1974] V.R. 465.

68. Including, e.g. bunker or oil as in The D'Vora [1952] 2 All E.R. 1127 or Shell Oil Company v. The Ship "Lastrigoni" [1974] 48 A.L.J.R. 295; nuts and bolts as in Lewmarine Pty. Ltd. v. The Ship "Kaptayanni" [1974] V.R. 465.

69. Shell Oil Company v. The Ship "Lastrigoni" [1974] 48 A.L.J.R. 295; The Turgot (1886) 11 P.D. 21.

70. Rendered obligatory under the Navigation Act 1912-73 (Comth.), Part II, Divs. 13 and 14.

lighterage, inspection or survey of a ship, whether to comply with statutory provisions or otherwise, and other work done.<sup>71</sup> Claimants seeking payment in respect of such services include stevedores, lightermen, statutory authorities, ship surveyors and possibly freight forwarders. Their right to institute proceedings in rem will depend on the two requirements being met. It is uncertain whether, under this proposed head, the court will entertain an action in rem against a ship merely for breach by her owner of an executory agreement to obtain supply of goods or services.

(13) Claim in respect of construction, alteration, repair or equipping of a ship.<sup>72</sup> Some doubts may be entertained as to whether a shipbuilding contract is an agreement to sell the ship or an agreement for work and materials.<sup>73</sup> In the former situation, an unpaid shipbuilder will be unable to bring a claim under the draft provision. For the purpose of the proposed admiralty jurisdiction, it is vital that a shipbuilding contract should not be construed merely as a transaction governed by the sale of goods legislation. Diplock, J., as he then was, in McDougall v. Aeromarine of Emsworth Ltd. correctly pointed out the twofold aspect when he said:<sup>74</sup>

"[I]t seems well settled by authority that although a shipbuilding contract is in form a contract for the construction of the vessel, it is in law a contract for the sale of goods."

In practice an unpaid shipbuilder or shipwright will only need to invoke the jurisdiction after he has parted with possession of the ship.<sup>75</sup> Otherwise the common law lien, based on his possession of the

71. Research Paper No. 1 - An Australian Admiralty Act; The Ambit of Admiralty Jurisdiction, *op. cit.*, pp. 198-199; see also Dr. S. Cigoj, "Legal Relations of Stevedores in Comparative Law", [1975] 3 L.M.C.L.Q. 296.

72. The simplification effected under clause 4 (3) (n) has resulted in the removal of claims for dock charges and dues to be covered under the next head. Cf. Supreme Court Act 1981 (U.K.), s. 20 (2) (n).

73. In Cammell Lavid & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd. [1934] A.C. 402, a contract for the construction of two ship propellers was held to be an agreement for the sale of goods; see Dr. M. Clarke, "In Consideration of Building Ships", [1981] 2 L.C.M.L.Q. 234; Dr. S. Mankalady, "Shipbuilding Contracts", [1983] 3 L.C.M.L.Q. 477, pp. 479-480.

74. [1958] 3 All E.R. 431, p. 436.

75. As to the passing of property in the ship to buyer and the position under the shipbuilding contract normally adopted by the Association of Western European Shipbuilders, see Dr. M. Clarke, Shipbuilding Contracts (1982), chapter 4 and page 158.

ship, will provide adequate protection.<sup>76</sup> It is submitted that, under this proposed head, a claim for alteration, repair or equipment of a ship cannot lie unless the shipowner, as distinct from the charterer, is liable to pay for it.

(14) Claim in respect of a liability for port, harbour, canal or light tolls,<sup>77</sup> charges or dues, or tolls, charges or dues of a like nature in respect of a ship. Clause 4 (3) (g) differs from section 20 (2) (n) of the Supreme Court Act 1981 (U.K.) in one important way. It sets out the various types of liability which a port authority, harbour board or statutory body may impose on a ship for services or facilities provided. The object no doubt is to raise revenue. Unfortunately, the variety of terms used in different State enactments to achieve the purpose tends to be confusing.<sup>78</sup> Often it is impossible to denote accurately all forms of liability created by legislation. An Australia-wide policy should be formulated to ensure uniformity.

Courts are less concerned with semantic labels than with the nature of the liability. This approach to the problem is seen in Newman & Dale v. Lamport & Holt.<sup>79</sup> The charterers of a ship exercised the option, reserved to them upon payment of port charges,

76. In The Tergeste [1903] P. 26, it has been held that, from the time of a ship's entry into dry dock, a shipwright's lien ranks in priority to the maritime lien of the crew and the master.

77. Light due is payable under the Lighthouses Act 1911 (Comth.).

78. Notable examples are found in Marine Act 1976 (Tas), ss. 74 et. seq.; Marine Act 1958 (Vic.), ss. 257, et. seq., as amended; Queensland Marine Act 1958, ss. 174, 219, 243 (h) and (j).

79. [1896] 1 Q.B. 20. In Societa Anonima U.A.M. v. Hamburg S.A. S.S. Co. (1912) 106 L.T. 957, under the charterparty, the charterer was bound to pay "all dues and duties on the cargo and the steamer to pay all port charges, pilotages, etc. as customary." The court held that the dues paid were not "dues and duties on the cargo" but were "port charges".

of unloading part of the goods at D. When the ship entered the Port of London, the whole of the light dues up to and including Leith became payable. Without such a deviation, the shipowners would be answerable for the light dues at Leith. The charterers avoided detention of the ship in the Port of London by paying the light dues. They regarded light dues as different from port charges which were payable by them, and claimed to offset them against the freight. The court gave judgment for the shipowners by holding that the light dues were charges.

Obviously the outcome of any proceedings brought under this proposed head will depend largely on the particular port or harbour legislation. If the ship as a res is answerable for the tolls, charges or dues imposed, it is no defence that under the charterparty some person other than the shipowner is personally liable therefor. Proceedings in rem may be instituted against the ship.

(15) Claim in respect of a ship, including a shipping levy imposed by the Protection of the Sea (Shipping Levy) Act 1981....<sup>80</sup> Levy on ships, which is the creation of Commonwealth legislation,<sup>81</sup> has been considered in Chapter Five.

Under the Protection of the Sea (Shipping Levy Collection Act 1981 (Comth.), recovery of levy due is effected by detention and sale of the goods or equipment belonging to the ship<sup>82</sup> and also by detention of the ship.<sup>83</sup> Since the Act (Comth.) does not empower the Collector<sup>84</sup> to sell the ship under detention, this proposed head will supplement the enforcement mechanism. In the final analysis, the levy due may be paid out of the proceeds of sale of the ship ordered by court.

(16) Claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship.<sup>85</sup> Section 1 (1) (p) of the

80. Clause 4 (3) (p).

81. Pollution of the Sea by Oil (Shipping Levy) Act 1972 (Comth.) and Pollution of the Sea by Oil (Shipping Levy Collection) Amendment Act 1979 (Comth.) repealed by Protection of the Sea (Shipping Levy Collection) Act 1981 (Comth.), s. 3. See also Protection of the Sea by Oil (Shipping Levy) Act 1981 (Comth.).

82. S. 11 (2).

83. S. 12 (1). For penalty imposed, see s. 12 (2).

84. He is the Collector for the purposes of the Lighthouses Act 1911 (Comth.).

85. Clause 4 (3) (q).

Administration of Justice Act 1956 (U.K.)<sup>86</sup> contained an identical provision. It has been reproduced verbatim in section 20 (2) (p) of the Supreme Court Act 1981 (U.K.). When given effect, this proposed head will rectify a number of anomalies in Australian admiralty law.

One serious difficulty faced by creditors in maritime law is the tendency of courts to place a narrow construction on the authority of persons who act as the shipowner's agent. In the Victorian case of The "Albion"<sup>87</sup> a person advanced money to pay off and discharge a crew for insubordination. His suit in the Vice-Admiralty Court brought under section 10 (2) of the 1863 Act (Imp.) failed. The reason was that at the time when the advance was made another person was officially in charge of the ship as master. In the South Australian case of The Louise Roth,<sup>88</sup> the chief mate had the ship seized by the Marshall of the Admiralty Court. The purpose was to enforce claims for, inter alia, disbursements for the ship's supplies and payments made by him to the crew for overtime. For a number of reasons his claims failed. Under maritime law, a mate had no lien for disbursements made by him. Moreover, it was also held that the Court had no jurisdiction to adjudicate upon a mate's claim for wages paid to the crew.<sup>89</sup>

It is submitted that the person who advances money or incurs liability on account of the ship should be allowed to enforce his claim under this proposed head. Although he is not the ship's master, he should be permitted to institute proceedings in rem in his capacity as an agent. The inclusion of "shipper" and "charterer" in the draft provision is a far-sighted measure. It takes cognizance of the fact that a shipper or charterer has a connection with the ship and that he may, in appropriate situations, incur liability on account of the ship. What is unclear is whether a claim can be brought if, as a result of certain compulsion, "disbursements" are made by a shipper, charterer or agent on account of the ship. To

86. As to extent of repeal, see Supreme Court Act 1981 (U.K.), Schedule 7.

87. (1872) 3 V.L.R. 1.

88. [1905] S.A.L.R. 107.

89. The Victoria 37 L.J. Adm. 12.

take delivery of goods, a shipper or charterer may be compelled to pay freight dues or certain rates which are by law imposed on the carrying vessel. Otherwise the goods may be indefinitely detained by port or harbour officials. In such instances, the payments are not made on the request of the shipowner or master.

We saw that section 1 of the Merchant Shipping Act 1889 (Imp.) gave the ship's master a maritime lien in respect of "disbursements properly made" and "liabilities properly incurred by him on account of the ship." Unfortunately, in The "Castlegate",<sup>90</sup> the House of Lords adopted a narrow construction of the words "disbursements on account of the ship." For disbursements for which a master was not authorised to pledge the owner's credit, the section was held not to confer on the former a maritime lien on the ship. Consequently no lien could attach to the freight.

At the international level, difficulties in obtaining credit facilities and defects in admiralty law must have contributed to the formulation of Article I paragraph (n) of the 1952 Arrest Convention. It reads:

"'Maritime Claim' means a claim arising out of one of the following:

Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner."

The provision was modified, reworded and given effect in the repealed section 1 (1) (p) of the Administration of Justice Act 1956 (U.K.). In The Westport,<sup>91</sup> it was held that under the section an agent could include agency fees in the charge for disbursements made by him on account of the ship.

One questions the wisdom of the observation made by the Australian Law Reform Commission in the following terms:

"It is less clear that disbursements should extend beyond the current definition of payments made 'on account of the ship'."<sup>92</sup>

90. [1893] A.C. 38.

91. [1966] 1 Lloyd's Rep. 342. Based on the decision in The Fairport (No. 5) [1967] 2 Lloyd's Rep. 162, it is submitted that there is no reason why advances made by the charterer, shipper or agent on account of the ship should not be recoverable as disbursements within the Supreme Court Act 1981 (U.K.), s. 20 (2) (p).

92. Research Paper No. 1 - An Australian Admiralty Act; The Ambit of Admiralty Jurisdiction, op. cit., p. 190.



The wide range of situations covered by this proposed head will provide the answer to many of the problems currently encountered by both shipowners and financiers. Even where a ship's master is unable to recover the advances made or liability incurred as disbursements under section 94 (2) of the Navigation Act 1912-73 (Comth.), he may have the alternative of proceeding in rem under this proposed head.

(17) Claim for an unpaid premium or other like amount due in respect of the insurance of the ship.<sup>93</sup> This proposed head will provide a significant remedy for a centuried defect in the law of Australia. It will be a far-reaching reform consistent with the increasing importance of marine insurance in modern shipping.

In The Andre Theodore<sup>94</sup> it was held that an insurance was not a necessary for a ship. Accordingly, neither the broker nor the underwriter could proceed in rem under section 6 of the Admiralty Court Act 1840 (Imp.) against a foreign ship for premiums. Also, as we have seen, in the New South Wales case of Stokes and Others v. The Conference,<sup>95</sup> the ship's agent was unable to recover the premium he had paid at the shipowner's request for the insurance upon the ship and the freight. Under the existing law and insurance practice, the gap is a problem not so much for underwriters as for brokers.

Sections 58 to 60 of the Marine Insurance Act 1909-73 (Comth.) which concerns the payment of premium are in pari materia with sections 52 to 54 of the Marine Insurance Act 1906 (U.K.). Bayley, J., in Power v. Butcher<sup>96</sup> explained the position in these words:

"According to the ordinary course of trade between the assured, the broker and the underwriter, the assured does not in the first instance pay the premium to the broker, nor does the broker pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter...looks to the broker for payment, and he to the assured."

93. Clause 4 (3) (r).

94. (1904) 10 Asp. M.C. 94.

95. (1887) 8 N.S.W.R. 10. It was based on the judgment of Sir James Hannen in Henrich Bjorn, L.R. 8 P.D. 151.

96. (1829) 10 B. & Cr. 329, p. 340; see also p. 347, per Parke, J.

This usage is now embodied in the Marine Insurance Act 1909-73 (Comth.). Section 60 reads:

"Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgement is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and the broker."

So firmly established was the practice that Collins, J., in Universo Insurance Co. of Milan v. Merchants Marine Insurance Co.<sup>97</sup> refused to give effect to an assured's express promise in the policy to pay the premiums to the underwriters.

The prerequisite for proceedings in rem under this proposed head is that the insurance must have been effected on the ship. It should be immaterial whether the premiums due to the broker are payable by the charterer, the person in possession of the ship, the shipowner or his agent.

The remedy in rem exercisable by a broker against the ship for recovering the premiums due is of special importance. The International Convention on Civil Liability for Oil Pollution Damage has been given the force of law by the Commonwealth Parliament.<sup>98</sup> Australian and foreign oil tankers entering or leaving any Australian port are required to carry insurance certificates. These certificates are issued on proof that valid insurance or other financial security is maintained in respect of the oil tankers in an amount sufficient to cover the liability limits prescribed by Article V paragraph I of the Convention.<sup>99</sup> The proposed jurisdiction will enhance the readiness of brokers and underwriters to issue oil-tanker policies on credit.

There is probably another substantial reason for making available the right to proceed in rem. Many shipping companies around the world are members of Protection and Indemnity Associations. They operate on the principle of mutual insurance within the meaning of section 91 of the Marine Insurance Act 1909-73 (Comth.).<sup>1</sup> Although

97. [1897] 1 Q.B. 205; upheld by the English Court of Appeal [1897] 2 Q.B. 93.

98. See Protection of the Sea (Civil Liability) Act 1981 (Comth.), supra.

99. Ibid., s. 16 (3) (a).

1. Apparently, the provisions are a re-enactment of the Marine Insurance Act 1906 (U.K.), s. 85.

under the rules, the members are bound to contribute to the losses which occur, it is clear that no premium can be quoted.<sup>2</sup> Since no losses or casualties can be known in advance, the policies issued to members omit the ordinary provision as to premium.<sup>3</sup> The principle applied is that each member must answer the calls when made, and also pay his share of the contribution to indemnify the losses suffered. It is submitted that the words "other like amount in respect of the insurance of the ship" should include contributions and calls payable to mutual insurance associations.

(18) Claim by a master, or a member of the crew, of a ship for wages (including a claim for an amount that a person, as employer, is under an obligation to pay to an employee, whether the obligation arises out of the contract of employment or by operation of law, including by operation of the law of a foreign country).

The enlarged jurisdiction to be conferred under clause 4 (3) (s) is best explained in two ways. The object is to remedy the defects. It provides the mechanism to enforce certain new rights and benefits to which seamen are entitled under improved terms of employment.

We have noted how various enactments were passed in the nineteenth century to empower magistrates, Supreme Court judges and later Vice-Admiralty Court judges to compel payment of wage claims of mariners. Successive legislation and judicial decisions, both Imperial and Australian, have consistently extended their rights.

The pattern of protection for seafarers was set by a number of pre-1840 decisions. In The City of London,<sup>4</sup> a mariner who was discharged from a vessel after signing the articles but before the commencement of the voyage was held entitled to sue for wages in the Court of Admiralty. It was not necessary for him to have

2. For further discussion on such associations, see V. Dover, A Handbook to Marine Insurance (18th ed. 1978), pp. 498-508.

3. E. Ivamy, Chalmers' Insurance Act 1906, (6th ed. 1966), pp. 132-133.

4. (1839) 1 Wm. Rob. 88. An amount not less than one month's wages will be payable for premature discharge of a seaman: Navigation Act 1912-73 (Comth.), s. 88 (1).

actually served on board. Case authorities have held that seamen wrongfully discharged in breach of ordinary contracts were entitled to be paid wages until the ship's return to the original port.<sup>5</sup> In The Great Eastern,<sup>6</sup> Dr. Lushington decided that a lien existed for damages for wrongful dismissal. Phillimore, J., in The Tergeste<sup>7</sup> gave a broad meaning to the term "wages". The victualling allowance granted to seamen who remained by the vessel after she was taken into a shipwright's dry dock was held to be equivalent to wages, carrying a maritime lien.

Section 118 (1) of the Navigation Act 1912-73 (Comth.) has adopted the effect of the decision. Thus where the provisions given are reduced or are of bad quality, seamen are entitled to recover, as wages, compensation according to a specified scale.

It is interesting to note that in the Victorian case of Keeney and Others v. The Ship "Aneiura"<sup>8</sup> jurisdiction over the wages of seamen and the master was extended. They were short of provisions. The court granted a shipping broker, who advanced money to purchase food supplies, a first charge on the proceeds of sale of the ship for the outlay together with eight per cent interest.

A valuable exception to the restrictive rule of practice is afforded to wage claims in The Fairport.<sup>9</sup> Cairns, J., after discussing the authorities, allowed the appeal against the registrar's ruling. He held that wages for services rendered after proceedings had commenced were recoverable as wages and not merely as part of the costs of an action. "The rule that claims in an action can be made only in respect of causes of action that have accrued at the commencement of the action" is held to be inapplicable to seamen's action in rem.<sup>10</sup>

5. The Elizabeth (1819) 2 Dods 403; The Beaver (1800) 3 C. Rob. 92; see also The British Trade [1924] P. 104.

6. (1867) L.R. 1 A. & E. 384.

7. [1903] P. 26.

8. (1927) V.L.R. 387; discussed in Chapter Seven in connection with wage lien and disbursement lien.

9. [1967] P. 167.

10. Ibid., p. 178.

Subject to a minor exception, "seaman" is defined by section 85 (6) to include a person employed or engaged in any capacity on board the ship. Whereas section 85 (6) defines "wages" to include such allowances as are prescribed," section 77 (6) gives it a narrower meaning by excluding any allowance for overtime work or payment which is not part of the ordinary wages of a seaman. It is submitted that whether a particular claim will qualify as wages within this proposed head depends on the meaning to be determined according to the relevant provision.

The wording of clause 4 (3) (s) seems broad enough to embrace social insurance and other contributions required to be made by employers under the law, whether Australian or foreign, for the benefit of seamen.<sup>11</sup> In The Halcyon Skies,<sup>12</sup> the plaintiff was employed under a special mariner's contract. It was held that he was entitled to a maritime lien as regards both the employee's and the employer's contributions. The reason given was that section 1 (1) (o) of the Administration of Justice Act 1956 (U.K.) had the effect of extending the maritime lien to such claims. It is submitted that a person who is allotted any sum out of the wages<sup>13</sup> or adjudged by a superintendent<sup>14</sup> to be entitled to any such money should be allowed to invoke the jurisdiction. Probably, in proceedings in rem by seamen and the ship's master to recover wages, the Court should be expressly empowered, in its discretion, to award interest on the amount due.<sup>15</sup>

(19) Claim for interest in respect of a claim referred to in paragraphs (a) to (s) of clause 4 (3). Like that of clause 4 (2) (d), its scope will depend largely on the construction given to the word "interest". If it is treated as a "catch-all" provision, i.e. extending beyond the meaning of an amount of money payable at a certain interest rate or per cent for use of a principal sum, its operation may create problems for the court.

11. In The Acrux [1965] P. 391, the court held that employers' social insurance contributions were not emoluments and were therefore outside the court's jurisdiction.

12. [1976] 1 All E.R. 856.

13. Navigation Act 1912-73 (Comth.), s. 71. 14. Ibid., s. 81.

15. See e.g. Merchant Shipping Act 1970 (U.K.), s. 12 which provides for interest to be awarded. However, it only applies to a master or person employed in a ship other than under a crew agreement.

(20) Other jurisdiction. One would have thought that the proposed legislation would expressly include the jurisdiction currently exercisable under the Colonial Courts of Admiralty Act 1890 (Imp.). The object is to forestall any loopholes that may arise. For example in The Queen of the South,<sup>16</sup> it was noted that claims for necessities did not figure at all in the lettered paragraphs of section 1 (1) of the 1956 Act (U.K.).<sup>17</sup> Brandon, J., very ably alluded to the sweeping-up provisions at the end thereof. The effect "is to preserve to the court independently of and concurrently with any jurisdiction specifically conferred over claims for, inter alia, necessities, as was formerly conferred by paragraphs (a) to (s), the same jurisdiction over claims for, inter alia, necessities, as was formerly conferred by the Acts of 1840, 1861, 1873 and 1875, and 1925."<sup>18</sup>

A similar approach is taken in formulating the Draft Admiralty Bill which seeks to confer on certain courts jurisdiction over related matters. Clause 13 reads:

"The jurisdiction that a court has under this Act extends to jurisdiction in respect of a matter of Admiralty and maritime jurisdiction not otherwise within its jurisdiction that is associated with a matter in which the jurisdiction of the court is involved."

Clause 13 differs from the repealed sweeping-up provisions in that it is designed to vest in Australian courts very extensive admiralty and maritime jurisdiction. Clause 14, however, sets the limit by expressly excluding from a court's jurisdiction any matter not mentioned in paragraph 76 (ii) and (iii) of the Commonwealth Constitution.

Under the proposed Act, jurisdiction is vested in the Federal Courts, State Supreme Courts and, with regard to actions in rem, the Supreme Courts of the Territories.<sup>19</sup>

16. [1968] P. 449.

17. As to extent of repeal, see Supreme Court Act 1981 (U.K.), Schedule 7.

18. [1968] P. 449, p. 455.

19. Draft Admiralty Bill, clause 11. As to the geographical, constitutional and other limits imposed on the jurisdiction exercisable by courts, see clause 41.

## 5. Scope of Claims and Mode of Exercise of Admiralty Jurisdiction

One policy matter concerns the extent to which the proposed Act should be given extraterritorial operation. It has to be considered in the light of many factors, including the availability of court officers to cope with the added work and the long-term benefits to Australia. The Draft Admiralty Bill displays a bold determination that Australia should capture a fair share of the lucrative litigation work in shipping matters. It has adopted the United Kingdom's approach as embodied in section 20 (7) of the Supreme Court Act 1981 (U.K.). Thus by clause 5 (1), the proposed Act will apply to

"(a) all ships,<sup>20</sup> irrespective of the place of residence or domicile of their owners; and

(b) all maritime claims,<sup>21</sup> wherever arising, including claims for salvage of cargo or wreck found on land."

It should be borne in mind that the underlying philosophy of the Administration of Justice Act 1956 (U.K.) and the Supreme Court Act 1981 (U.K.) had its origin in the two International Conventions.<sup>22</sup> The 1952 Arrest Convention, in particular, serves to harmonise the widely-differing ship arrest procedures used in the United Kingdom with a common law background and in other European States following the broader civil law approach.<sup>23</sup> In giving effect to the uniform rules contained in the 1952 Arrest Convention, the United Kingdom had modified, and apparently deviated from, the original plan to establish a unique Empire-wide system of maritime law. Invested with the new jurisdiction, the English Admiralty Court is seen to be operating alongside its European counterparts in administering and enforcing similar rules of admiralty law. The Draft Admiralty Bill is a belated move to bring Australian admiralty law into line with the vital changes and developments which characterise

20. Subject to minor exceptions, the definition of "ship" in clause 3 (1) is wide enough to embrace a vessel propelled by oars, a foreign vessel and an unregistered vessel.

21. They comprise proprietary maritime claims and general maritime claims as defined in clause 4 (1).

22. I.e., the International Convention on certain Rules concerning Civil Jurisdiction in Matters of Collision, 1952, and the International Convention relating to the Arrest of Seagoing Ships, 1952.

23. D.R. Thomas, "The Sister Ship Action in Rem", [1979] 2 L.C.M. L.Q. 158. —

the admiralty laws of European maritime nations.

Clause 10 differs from section 22 (1) of the Supreme Court Act 1981 (U.K.) in two significant respects. First, by clause 10 jurisdiction is conferred on various courts to entertain proceedings in personam on "a maritime claim" or "on a claim for damage done to a ship". The expression "maritime claim" is defined by clause 4 (1) as a reference to a proprietary maritime claim or a general maritime claim. It includes a claim for loss of life or for personal injury. Section 22 (1) is stated to apply to any claim for damage, loss of life or personal injury arising in cases of collision, navigation and non-compliance with the collision regulations. Secondly, under section 22 (2), the High Court's jurisdiction to entertain an action in personam in relation to any claim in section 22 (1) cannot be exercised unless the conditions laid down are satisfied. The jurisdiction conferred by clause 10 is not expressed to be subject to any requirements being met. It is questionable whether the usual prerequisites with regard to ordinary civil actions will apply.

#### 6. Proceedings in Rem

##### (i) Maritime Lien or other charge

In Chapter Seven, the types of claim carrying maritime liens have been examined. With the exception of bottomry, each of the other four types of maritime lien is expressly taken cognizance of in clause 17 (2) of the Draft Admiralty Bill. Like section 21 (3) of the Supreme Court Act 1981 (U.K.), clause 17 (1) permits the holder of "a maritime lien or other charge" to proceed in rem against the ship or other property.<sup>24</sup> The words "other charge" are not defined in the Draft Admiralty Bill. In The St. Merriel,<sup>25</sup> it was held that they do not include a possessory lien on a ship. They appear to have the meaning specially given to them in the context of certain provisions of the Merchant Shipping Acts (Imp.)<sup>26</sup> and the Navigation

24. Including the proceeds of sale of the ship or other property: Draft Admiralty Bill, clause 24; Draft Admiralty Rules, Order 70 (1).

25. [1963] P. 247.

26. 1894 Act (Imp.), s. 513; 1906 Act (Imp.), ss. 35 (2) and 42.



Act 1912-73 (Comth.).<sup>27</sup> In keeping with the extraterritorial object of the proposed Act, it is suggested that "other charge" could be applied to a right or interest acquired under foreign law, which has characteristics similar to those of a maritime lien.<sup>28</sup>

(ii) Proprietary Maritime Claims

These claims are set out under four paragraphs in clause 4 (2). Proceedings in rem may be brought on any of them against the ship concerned.<sup>29</sup> In so far as such proceedings are permitted on claims under clause 4 (2) (a) (iv), (c) and (d), the Draft Admiralty Bill is seen as going beyond principle of the 1952 Arrest Convention.<sup>30</sup>

(iii) General Maritime Claims

Ship beneficially owned or under demise charter. We shall now consider situations where, based on one or more of the claims arising under clause 4 (3) (a) to (t), proceedings in rem may be instituted.

By clause 19, the ship or property may be the subject of the action where "a relevant person -

- (a) was, at the time when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property concerned; and
- (b) is, at the time when the proceeding is commenced, the owner of the ship or property."

In several important respects, the action contemplated by clause 19 differs from that based on section 21 (4) of the Supreme Court Act

27. Ss. 128 (2), 163A (2) (d) and 298 (2).

28. E.g. in The Colorado [1923] P. 102, the English Court of Appeal appears to have accepted a French hypothèque as giving rise to the equivalent of a jus in rem. It gave mortgagees a limited right to follow the property into the hands of a subsequent purchaser. It is not suggested that the class of maritime liens currently recognised under Australian admiralty law should be enlarged. It seems that for the purpose of jurisdiction exercisable under clause 17 (1), claims which are recognised by foreign laws as carrying maritime liens, though not so under Australian law, should be treated on par with "other charge".

29. Under the Draft Admiralty Bill, clause 24, proceedings in rem may be brought against the money paid into court as the proceeds of sale of the ship.

30. See Article 3 para. 1. Clause 4 (2) is much wider in scope than the Supreme Court Act 1981 (U.K.), s. 21 (2).

1981 (U.K.). Under clause 19, there is no requirement that "a relevant person" must be one who would be liable on the claim in an action in personam. The removal of this obstacle will strengthen the claimant's position and is in line with the enlightening judgment in The St. Elefterio.<sup>31</sup> There the bills of lading issued for a cargo of cattle cake shipped by charterers were signed and wrongly antedated by the ship's master. They were endorsed in blank to the plaintiffs who presented them to their purchasers. The purchasers rejected the bills of lading when the dates of shipment were found to be incorrect. The plaintiffs brought an action in rem under sections 1 (1) (h) and 3 (4) of the 1956 Act (U.K.). The defendant shipowners moved to set aside the writ in rem and warrant of arrest directed against the ship. For the defendant shipowners two issues were raised in argument. First, before the plaintiffs could succeed in proceedings in rem regarding the claim they had to show that the defendants were persons who would be liable on the claim in an action in personam. Second, the defendants could not in law be held liable even if the antedating of the bills of lading was done fraudulently by the ship's master. Willmer, J., had no difficulty in rejecting the arguments. He rightly held that the purpose of the words "the person who would be liable...in personam" is to identify the person (the "relevant person") whose ship may be arrested in relation to the new right under section 3 (4).<sup>32</sup> He further explained:<sup>33</sup>

"...the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds. This action might or might not succeed if it were brought in personam."

The "relevant person" need not be personally liable in respect of any of the claims in clause 4 (3) (a) to (t). It implies that the liability could have been incurred by someone other than the relevant person, with or without the latter's consent. We have seen

31. [1957] P. 179.

32. Administration of Justice Act 1956 (U.K.).

33. [1957] P. 179, p. 186.

that in The "Castlegate",<sup>34</sup> the charterers, and not the shipowners, were personally answerable for the coals supplied to the ship. For the condition in clause 19 (a) to be met it is essential for the person in question to be identified in a certain capacity with the ship or property when the cause of action arose. This identifying link, which is also an underlying aspect of the principle of the 1952 Arrest Convention, is based on his being the owner or charterer of, or in possession or control of, the ship or property. In The "Permina 108",<sup>35</sup> the Court of Civil Appeal of Singapore construed the term "charterer" in section 4 (4) of the High Court (Admiralty Jurisdiction) Act (S'pore), which was in pari materia with section 3 (4) of the 1956 Act (U.K.), to include an ordinary charterer.<sup>36</sup> On the other side of the line falls the Hong Kong High Court decision in The Ledesco Uno<sup>37</sup> which seems to have unwarrantedly confined the term "charterer" to a demise charterer. It is arguable that the words "or in possession or in control of the ship", as used in the old 1956 Act (U.K.),<sup>38</sup> indicate what the United Kingdom Parliament had understood to be the policy of the 1952 Arrest Convention. Taken in the ordinary natural sense, the words appear wide enough to embrace the interests of non-demise charterers, bailees, shipwrights, while the ship remains in their shipyard, and possibly agents or management companies with unlimited authority as to the employment of the ship. A ship mortgagee who, in the exercise of his right, has taken possession of the ship, whether actual or constructive, will be included.<sup>39</sup> What is not clear is whether a master officially in charge of the ship is deemed to be in control thereof

34. [1893] A.C. 38.

35. [1977] 1 M.L.J. 49.

36. Ibid., p. 50, per Wee, C.J.

37. [1978] 2 Lloyd's Rep. 99.

38. Administration of Justice Act 1956, s. 3 (4).

39. When actual possession cannot be taken of the ship which is overseas, a ship mortgagee may take constructive possession of her. The acts done, e.g. appointment of a new master to take charge on the mortgagee's behalf, must show a clear intention to assume the right of ownership: The Benwell Towell (1895) 72 L.T. 664.

within the meaning of clause 19 (a).

The condition in clause 19 (b) requires the person in question to be owner of the ship or property at the time when the action is commenced.<sup>40</sup> In order not to restrict unduly the right of a claimant it is desirable to construe "owner" in a broad sense. It should include an equitable or unregistered owner as respects all the shares in the ship and also a person to whom property in the entire ship has passed under a contract of sale.

It is interesting to note that the identifying link is extended to the owner of the "property" other than ship. Cargo or any equipment carried on board at the material time may be deemed to be in the possession or control of the shipowner, demise charterer or mortgagee in possession of the ship within the meaning of clause 19 (a). Moreover, in some cases, a salvor working on a wreck or derelict may acquire sufficient control or possession<sup>41</sup> of the property so as to come within the meaning of clause 19 (a). For the property to be proceeded against in an action in rem, the condition in clause 19 (b) must also be satisfied. The right which clause 19 seeks to confer is wider in scope than that provided under the 1952 Arrest Convention or section 21 (4) of the Supreme Court Act 1981 (U.K.).

Clause 20 differs from clause 19 in two respects. It does not provide for proceedings in rem against property other than ship.

40. It is submitted that the criterion is the time when the writ is issued, even though it is not served on the ship or property concerned. In The Monica [1967] 3 All E.R. 740, it was decided that a statutory right of action in rem is unaffected by a change of ownership of the ship after the issue of the writ, even before service. In Trow v. Ind. Coope (West Midlands) Ltd. [1967] 2 All E.R. 900, the English Court of Appeal construed the word "day" in the English R.S.C., Order 6, r. 8 (1) to mean day. As no account of fractions of a day was taken, the time of the day when the writ was served was immaterial.

41. In The Tubantia [1924] P. 78, the President held that the plaintiff salvors had had sufficient possession of the Tubantia to exclude third parties from interfering with the property. As to the possessory right of salvors, see G. Brice, Maritime Law of Salvage, (1983 ed.), pp. 92-94.

On the other hand, an action in rem may be brought against the ship even though the relevant person is merely a demise charterer under clause 20 (b).

It appears that the overriding object of the 1952 Arrest Convention is to prevent the claims of creditors vis-a-vis the ship from being unjustly defeated. The provision to be made by clauses 19 and 20 will serve to forestall devious arrangements made by shipowners to overreach the rights of creditors. Australian courts will be able to adjudicate upon many of the maritime claims hitherto diverted to admiralty courts in England and other Commonwealth countries, and to provide adequate redress for wrongs suffered by creditors and claimants.

Surrogate ship. By clause 21, an action in rem may be instituted against the surrogate ship (or "sister ship") provided conditions (a) and (b) are satisfied. Condition (a) is the same as that in clauses 19 (a) and 20 (a), discussed above. By clause 21 (b), the relevant person must, "at the time when the proceeding is commenced", be "the owner of, or demise charterer of, the other ship."

From the viewpoint of comparative aspects, it should be noted that the words "beneficially owned as respects all the shares," as used in both section 3 (4) (a) and (b) of the 1956 Act (U.K.), had given rise to two conflicting interpretations. In The St. Merriel,<sup>42</sup> Hewson, J, had to construe those words. He recognised the circumstances where a ship, though owned by one person with the right to sell, is yet "beneficially possessed, or beneficially controlled, by some other person such as in this case...."<sup>43</sup> He held that the words "as respects therein" were intended by the Legislature to refer to "the true owner". On the interpretation he adopted, the ship was held not liable under section 3 (4) (a), since the liability for the ship's repairs was incurred by the demise charterer and not by the true owner.

About eight years later, similar facts arose in The Andrea Ursula.<sup>44</sup> Brandon, J., succeeded in coming to grips with the problem

42. [1963] P. 247.

43. Ibid., p. 258.

44. [1973] 1 Q.B. 265; the decision in The St. Merriel [1963] P. 247 was not followed.

by resorting to judicial analogy<sup>45</sup> and taking a fresh look at the principle of the 1952 Arrest Convention. His premise was that if section 3 (4) was to give full effect to article 3, including in particular paragraph (4) of that article, the expression "beneficially owned" had to be given a broad meaning. He therefore ruled that "beneficial owner" "includes not only a demise charterer but also any other person with similar complete possession and control"<sup>46</sup> who would be liable under section 1 (1) (d) to (r) of the 1956 Act (U.K.).

Unfortunately, the construction applied by Brandon, J., in dealing with the grievances of ship repairers in Britain created an anomalous situation. Several courts in the British Commonwealth have in effect endorsed the view of Hewson, J., and have declined to follow the proposition of Brandon, J. In The "Pangkalan Susu/Permina 3001"<sup>47</sup> the High Court of Singapore held that full possession and control did not have the meaning of "beneficially owned as respects all the shares therein" in section 4 (4), the Singapore equivalent of section 3 (4) of the 1956 Act (U.K.). On appeal, the judgment was upheld by the Court of Civil Appeal. Wee, C.J. said:<sup>48</sup>

"In our opinion, it would be a misuse of language to equate full possession and control of a ship with beneficial ownership as respects all the shares in a ship. The word 'ownership' connotes title, legal or equitable whereas the expression 'possession and control', however full and complete, is not related to title."

The judgment of Wee, C.J., was closely followed by the Malaysian Federal Court of Civil Appeal in The "Loon Chong".<sup>49</sup> It was held that, since the bareboat lease agreement did not confer legal or equitable ownership of the ship but only possession and control, the action in rem was not maintainable against the ship. By section 26 of the Courts of Judicature Act 1964 (Mal.), the civil jurisdiction

45. Reliance was placed on the House of Lords decision in The Hopper No. 66 [1908] A.C. 126, p. 136, where the word "owner" in the Merchant Shipping Act 1894 (Imp.), ss. 503 and 504 was held to include a demise charterer: [1973] 1 Q.B., pp. 272-273.

46. [1973] 1 Q.B. 265, p. 272.

47. [1977] 1 M.L.J. 141.

48. [1977] 2 M.L.J. 129, p. 130.

49. [1982] 1 M.L.J. 212.

of Malaysian High Courts embraces "the same jurisdiction and authority in relation to admiralty matters" as was exercisable under the Administration of Justice Act 1956 (U.K.).

The inclusion in section 21 (4) (i)<sup>50</sup> of "charterer...under a demise charter" means that, for the purpose of this provision, demise charterers and owners are placed in the same position. Accordingly, the enlarged provision is intended to remove the effect of the construction given by Hewson, J., in The St. Merriel,<sup>51</sup> which was followed by Singapore and Malaysian courts. But section 21 (4) (ii) only permits proceedings in rem to be brought against the other ship "of which...the relevant person is the beneficial owner as respects all the ships in it." With the provision must be compared the proposed Australian position. Clause 21 (b) provides that the other ship may be proceeded against in rem where the relevant person is the owner or demise charterer thereof. Creditors will enjoy wider protection under the proposed law than under current English or Singapore law. It is submitted that a claimant, whose right is derived through subrogation or based on an assignment, should also be permitted under clause 21 to proceed in rem against the surrogate ship.<sup>52</sup>

Since court process including the warrant of arrest cannot be served out of the jurisdiction,<sup>53</sup> "surrogate ship" actions are an answer to many of the problems presently faced by creditors. The practice of English and Singapore solicitors is this. Where it is unknown in advance which of the defendants' ships would come within the admiralty jurisdiction of the court, the names of all their ships are included in the writ of summons and warrant of arrest. When one of the defendants' ships shows up, the writ and the warrant of arrest are quickly amended by deleting the other ships' names and are served on the ship. A ship, when arrested constitutes a

50. This provision in Supreme Court Act 1981 (U.K.) differs from the repealed Administration of Justice Act 1956 (U.K.), s. 3 (4) (a).

51. [1963] P. 247.

52. Very likely the action will have to be brought in the name of the subrogator or assignor.

53. Draft Admiralty Bill, clause 23 (1) and (2); in Aichhorn & Co. K.G. and Switzerland General Ins. Co. Ltd. v. The Ship M.V. "Talabot" (1974) 132 C.L.R. 449, the High Court held that service of a writ in rem cannot be validly effected out of the jurisdiction.

valuable security to the claimant. Indeed the protection under English law has been remarkably strengthened by the decision in The Monica.<sup>54</sup> Brandon, J., held that a change of ownership of a ship after the issue, but before service of the writ, did not defeat the right to proceed in rem against the ship under the Administration of Justice Act 1956 (U.K.). There is no reason why this rule should not apply to a sister-ship action provided, of course, that the name of the sister ship appears on the writ which is issued before the change of ownership occurs. Otherwise the principle of the 1952 Arrest Convention may be easily circumvented.

One vital issue concerns the number of ships that may be arrested. This aspect of claimant protection is of immense importance where the loss or damage suffered exceeds the value of the ship against which proceedings are brought. Under English law, a defendant in an action in rem, who does not enter an appearance, is not liable for the full amount of the judgment<sup>55</sup> where it exceeds the value of the res.<sup>56</sup> The wording of clause 31 (1) of the Draft Admiralty Bill 1985 suggests that, in certain circumstances, "a relevant person" may not be able to limit his liability that way. If the view is correct, clause 31 (1) when enacted as law could result in another important difference between the laws of the two countries.

In Monte Ulia (Owners) v. Banco and Others (Owners),<sup>57</sup> the Banco was so negligently navigated that the Monte Ulia had to take emergency action to avoid the former. In so doing, the Monte Ulia collided with the jetty and damaged a large oil pipeline. Crude oil escaped and caught fire, destroying the jetty. The Monte Ulia owners, as plaintiffs, brought an admiralty action in rem. They claimed damages estimated at £9,000,000 for the damage to the Monte Ulia and indemnity or contribution in respect of the claims made against them by the oil company and others. The writ and warrants of arrest were served on the Banco and six sister ships, all owned by the defendants. Lane, J., set aside the service of the writ on the six sister

54. [1967] 3 All E.R. 740.

55. The Dictator [1892] P. 304; The Joannis Vatis (No. 2) [1922] P. 213.

56. As to position where appearance was entered and bail given, see The Dupleix [1912] P. 8; The Dictator [1892] P. 304.

57. [1971] P. 137.



ships and discharged the warrants of arrest on them. The English Court of Appeal unanimously dismissed the appeal brought by the plaintiffs. Although the United Kingdom did not ratify the 1952 Arrest Convention until 18th March, 1959, the provisions of the 1956 Act (U.K.) relating to "Admiralty jurisdiction were, at least to some extent, enacted in order" to conform to the 1952 Arrest Convention.<sup>58</sup> In both article 3 paragraph 3 of the 1952 Arrest Convention and section 3 (4), the word "or" made it unambiguously clear that the admiralty jurisdiction in rem could be invoked either against the offending ship, i.e. the Banco, or against any other ship in the same ownership, but not against both.

As regards the number of ships that may be arrested, the Draft Admiralty Bill adheres closely to Article 3 of the Arrest Convention. By clause 22 (2) where a ship has been arrested under clause 17, 19, 20, or 21, no other ship "shall be arrested" in the proceeding. The restrictions do create a serious problem for plaintiffs with large claims. If a defendant shipowner does not enter an appearance or furnish bail, the plaintiff will be disadvantaged. He may have only one ship as security for the payment of his claims. However, clause 22 (2), when read in conjunction with clause 22 (3), suggests that an exception exists in respect of claims which carry a maritime lien or other charge. If the reasoning is correct, a plaintiff should, wherever possible, split up his claims into two categories. Despite clause 22 (2), it appears that a plaintiff may enforce those claims which carry a maritime lien or other charge on the ship by taking proceedings in rem against her. It is submitted that the other claims, which are of a different category and which do not carry any such lien or charge, may be enforced by taking proceedings in rem against another ship.

Another approach to the problems is to construe the words "same claim" in clause 22 (1) to mean any instalment or sum due and unpaid in respect of any charterparty hire or any single transaction. Thus where monthly instalments due under a charterparty are not paid for two months or costs of repairs effected on the ship on two different occasions remain unpaid, it is submitted that there are two separate causes of action. A classic example of this ingenious line of

58. Ibid., p. 157, per Megaw, L.J.



reasoning is found in the Singapore case of The "Permina Samudra XIV."<sup>59</sup> The respondents owed the appellants the sum of \$U.S. 7,230, 711.48 by way of charterparty hire in respect of the ship "ibnu". Two writs - each claiming for roughly half the amount - were taken out. Each writ and the warrant of arrest named only one ship. In this way, two ships belonging to the respondents namely, the "Permina 108" and the "Permina Samudra XIV" were arrested. The trial judge held that, where a number of instalments for charterparty hire were due, they merged and became a single debt and that only one ship could be arrested. The appeal to the Singapore Court of Civil Appeal was allowed. Wee, C.J., held that two separate writs, each based on a distinct cause of action and naming only one ship, had been issued and served on the ships, respectively.<sup>60</sup>

It is suggested that one way of defeating "surrogate ship" actions is to incorporate single-ship owning companies. The argument rooted in the principle of separate legal entity is that the company that owns the ship is a different person from the shareholders. An alternative method suggested is to split up the shares in each of the ships so that they are held beneficially by two or more persons. It is submitted that no proceedings in rem may be maintained under the draft provisions<sup>61</sup> if the expression "owner of the ship" is construed to mean that the relevant person must beneficially own all the shares in the particular ship.

Since the object of decentralizing the holding of shares in ships is to oust the court's jurisdiction, the facts of each case will be examined closely. A sophisticated attempt was made in The "Enfield"<sup>62</sup> to defeat the creditors' claims by relying on the concept of separate legal entity and the defence of different ownership. The m.v. "Enfield" was arrested in Singapore by the plaintiffs as security for disbursements incurred by them as shipowners' agents in

59. [1977] 1 M.L.J. 47.

60. The Singapore Court of Appeal decision appears to have undermined the principle underlying the 1952 Arrest Convention, Article 3, paras. 3 and 4.

61. Draft Admiralty Bill, clauses, 19, 20 and 21.

62. [1982] 2 M.L.J. 106.



Madras. In the trial court, the allegedly new shipowners sought unsuccessfully to set aside the writ and all proceedings. It was their argument that the requirement of section 4 (4) of the Singapore Act<sup>63</sup> was not satisfied. The defence raised was that the ship had been transferred several times and that, since the accrual of the causes of action, a Panamanian corporation, Barbury, had become the latest owner. It was found that Richard Hwa was the principal shareholder and managing director of Gary Line which had rights to the ship prior to her purported sale to the Panamanian corporation. Of the three offices in the Panamanian corporation, one was held by Richard Hwa's mother as president, and another was held by Richard Hwa's wife as secretary. D'Cott, J., dismissed the motions. The learned judge had no difficulty in holding that Richard Hwa was the owner of the vessel at the time the cause of action arose and also beneficially owned all the shares therein at the time the proceedings commenced. In dismissing the appeal, the Singapore Court of Civil Appeal held that the purported sale of the ship to Barbury was a device and a sham designed to defraud the respondents and to put the ship as security out of their reach.<sup>64</sup>

It is questionable whether it is necessary for the proposed Australian Act to provide for the corporate veil to be lifted in the above circumstances. The cases where a corporate entity has been disregarded illustrate no consistent principle.<sup>65</sup> Under the companies legislation of Australia and the United Kingdom and at common law, the courts generally are competent to deal with fraudulent transactions and devious ownership arrangements effected under the cover of corporate personality.<sup>66</sup> Few serious problems have been encountered in this area. It is undesirable for Australian courts to be expressly empowered by legislation to disregard the corporate veil

63. The High Court (Admiralty Jurisdiction) Act, Cap. 6, Singapore Statutes, 1970 Rev. Ed.; the provision being in pari materia with the Administration of Justice Act 1956 (U.K.), s. 3 (4).

64. [1982] 2 M.L.J., p. 108.

65. See L.C.B. Gower, Gower's Principles of Modern Company Law, (4th ed. 1979), pp. 123-133, as to situations concerning agency, trust, fraud and improper conduct; also H.A.J. Ford, Principles of Company Law, (3rd ed. 1982), paras. 701-707 and 2229.

66. However, in The "Asean Promoter" [1982] 2 M.L.J. 108, the judge refused to accept the counsel's argument that the corporate veil should be lifted. It was not proved that the relationship between the two companies was that of a holding company and a subsidiary company or that of principal and agent, or that fraud was involved.



of ship-owning companies. Otherwise it might open the door to harassment by creditors against shipowners. It is submitted that clause 32 (1) of the Draft Admiralty Bill 1985 which deals with related corporations extends too far beyond the principle underlying the 1952 Arrest Convention.

## VII. CONCLUSION

Australian admiralty law is probably one of the most backward and neglected areas of the jurisprudence. The problems we have considered in Parts II, III and IV of this chapter and elsewhere in the work point to the gross injustice suffered by maritime creditors and other claimants over a prolonged period.

The early colonial legislation represented initial attempts to invest magistrates, Supreme Court judges and Vice-Admiralty judges with limited admiralty jurisdiction. The proposed Admiralty Act is an epoch-making move, currently under way, to confer on Australian courts wide-ranging jurisdictions for the purpose of administering maritime law. One feature of the prospective law is that it is based on the hitherto little-used powers exercisable by the Commonwealth Parliament.<sup>67</sup> The Draft Admiralty Bill is wider in scope than the Supreme Court Act 1981 (U.K.). When enacted into law, it will usher in a new era of significant development in Australian maritime law. In a number of situations, the remedies and redress available will be more extensive than those which are currently open to claimants under the Supreme Court Act 1981 (U.K.).

The proposed Admiralty Act is not intended to be a code in any sense. Where the wording of the proposed heads of jurisdiction is in pari materia with that of corresponding provisions in the United Kingdom's legislation,<sup>68</sup> relevant English case authorities will provide

67. See Commonwealth of Australia Constitution Act 1900 (Imp.), ss. 51, 76, 77, 98 and 122. For elaborate comments, see Research Paper No. 1 - An Australian Admiralty Act: The Ambit of Admiralty Jurisdiction, *op. cit.*, pp. 62 *et. seq.*

68. *I.e.* heads of jurisdiction in Administration of Justice Act 1956 (U.K.), and in Supreme Court Act 1981 (U.K.).





valuable precedents. One observation in relation to the novel heads of jurisdiction proposed, e.g. claims for interest, for freight mortgage, for economic loss, etc. should be made. Unless they are construed and exercised within well-defined limits, they could result in vexatious proceedings in rem being instituted for the purpose of harassing shipowners. Undoubtedly, the proposed Act will markedly increase Australia's revenue from litigation in maritime law, and the present level of legal work.

There could be undesirable economic effects. The likelihood of Australia being chosen by creditors and other claimants as the "ship arrest" forum may deter shipowners and ship operators from sending their ships to Australian ports. To avoid arrest, foreign ships may refuse to carry goods into Australian ports. Alternatively, Australia-bound goods may be transhipped for delivery to Australian importers. Cargo transshipment can be carried out on the high seas, just outside Australian courts' jurisdiction, or at a foreign port. This forum-avoiding strategy, if frequently adopted by foreign ships, will increase freight charges, cargo damage and transit time.

It is felt that the omission from the proposed Act of a head of jurisdiction which empowers courts to order the forfeiture and condemnation of ships is unfortunate.<sup>69</sup> A ship which is forfeited or condemned for breach of legislation,<sup>70</sup> or by reason of international law<sup>71</sup> may, by order of court, be sold free from encumbrances. It

69. The Australian Law Reform Commission regards ship forfeiture or condemnation as a penal remedy which is out of place in the proposed Act conferring basically civil jurisdiction: Research Paper No. 1 - An Australian Admiralty Act; The Ambit of Admiralty Jurisdiction, op. cit., pp. 200-204. Cf. Supreme Court Act 1981 (U.K.), s. 20 (2) (s).

70. Shipping Registration Act 1981 (Comth.), ss. 32 and 33. Forfeiture is frequently used by the Legislatures to enforce revenue policies, e.g. under the Customs Act 1901-73 (Comth.), ss. 148 and 228; as a control mechanism to prevent over-exploitation of fish resources in Australian waters, e.g. under the Fisheries Act 1952-75 (Comth.), ss. 4 and 13D. In Fang Chin Faa v. Puffett (1978) 22 A.L.R. 149, the master's appeal against the court's order to forfeit the fishing boat was allowed. Gallop, J., construed s. 13C of the Act as giving the court a discretion in the matter.

71. By established usage and the recognition of nations, goods being conveyed to a belligerent State may be seized as contraband, and the ships carrying them may be captured and condemned for running blockades: Ex p. Chavasse, re Grazebrook (1865) 4 De G. & S. 655; The Helen (1865) L.R. 1 A. & E. 1, 4, per Dr. Lushington.



will be expedient for the same court, if not in the same proceedings, to assume jurisdiction over all such matters, including the claims of third parties, relating to the res. There is another reason in support of conferring the "forfeiture or condemnation" jurisdiction under the proposed Act. A ship may be arrested by creditors in an action in rem. If proceedings for her forfeiture or condemnation are also brought against her, the creditors - it is submitted - should be able to defend their interests in the same court.

Two aspects of the courts' jurisdiction does not appear to have been considered by the Australian Law Reform Commission. First, it is nowhere provided in the Draft Admiralty Bill that the Australian courts concerned will be empowered in their discretion to award compound interest. This matter is of importance in the light of the "interest claims" introduced by clause 4 (2) (d) and (3) (t). The statement of Eveleigh, L.J., in the Garden City that no compound interest was awarded on the limitation figure under English law appears to apply to maritime claims as a general rule. He said:<sup>72</sup>

"...I am not aware that compound interest has been awarded on the limitation figure let alone compound interest on simple interest which the court awards in addition to the limitation figure."

In cases involving large claims and prolonged delays before the delivery of judgment, a successful plaintiff may, for reasons of inflation and currency devaluation, suffer injustice unless the damages awarded carry compound interest.

Second, in view of the international character of most of the claims, it is suggested that the proposed law should expressly empower the Australian courts concerned to award damages or compensation in foreign currency. This submission is in line with developments emerging from a number of fairly recent English decisions.<sup>73</sup>

72. [1984] 3 All E.R. 59, p. 65.

73. The effects of these cases are clearly analysed by S. Isaacs, in "Foreign Currency Claims and the English Courts", [1977] 3 L.M.C.L.Q. 356; see also D. Hene, "Judgments in Foreign Currencies" [1975] 1 L.M.C.L.Q. 19, pp. 23-24.



## GENERAL CONCLUSIONS

It is desirable to review the following matters. These emerge from a consideration of the material which has been the subject matter of this research project relating to Australian maritime law.

### I. RECEPTION AND DEVELOPMENT OF MARITIME LAW IN AUSTRALIA

The package of pre-1900 Imperial Acts<sup>1</sup> operated as the main "law transfer" mechanisms both before and, for over four decades,<sup>2</sup> after the Commonwealth was formed. English maritime law, both statute and unenacted, was systematically incorporated into the Australian jurisprudence. The close resemblance that existed between the laws of the two countries up to 1920 reflects Britain's success in implementing her Imperial shipping policy in Australia.

Today the reception of English maritime law is on a much reduced scale. Colonial Courts of Admiralty continue to operate as part of the Commonwealth and State court systems. Indeed, their jurisdiction has been extended to administer Australian maritime law and to entertain claims and causes arising thereunder.<sup>3</sup> Part I of the Merchant Shipping Act 1894 (Imp.) was repealed. However, the Shipping Registration Act 1981 (Comth.) has reinstated, as part of the laws of the Commonwealth and the States, the principles of equity and most of the statutory provisions relating to ship mortgages which applied under the repealed Imperial Act. The Navigation Act 1913-73 (Comth.) was largely a consolidated re-enactment of the Imperial legislation. Moreover, the Draft Admiralty Bill 1985 has adopted a number of expressions which are similar to those used in the Administration of Justice Act 1956 (U.K.) and the Supreme Court Act 1981 (U.K.). Consequently, the judicial pronouncements of Superior Courts in England in those matters will invariably influence the development of Australian maritime law.

The post-1920 era saw the emergence of two diverging trends in legal history. They have undermined the "law reception" mechanisms, and the longstanding consistency between the laws of the two

1. See General Introduction.

2. I.e. until the Statute of Westminster Adoption Act 1942 (Comth.) was passed.

3. See Shipping Registration Amendment Act 1984 (Comth.), s. 29 and Navigation Act 1912-73 (Comth.) generally.



countries.

First, in the United Kingdom, the process of breaking away from the Imperial goal of establishing an identical body of maritime law for the entire Empire was set in motion by a new legislative policy. The reason is found in the United Kingdom's alignment with the other maritime nations in the effort to promote international certainty and uniformity in certain areas of the law. This move is marked by the passing of a series of Acts (U.K.) which, unlike most of the pre-1920 Acts (Imp.),<sup>4</sup> had no application to Australia. The post-1920 Acts (U.K.) not only extended the admiralty jurisdiction of English Courts but also gave effect to a number of international maritime conventions. These legislative measures have produced major changes in English maritime law. It is equally true that the Commonwealth's failure or delay to implement similar changes, particularly with respect to admiralty jurisdiction and the limitation of liability, has resulted in important differences between the laws of the two countries.

The second more decisive trend arose from the establishment of the Commonwealth and her subsequent attainment of Dominion status. It is entitled to pursue an independent policy in Australia's best interests. The exercise of its sovereign right has given rise to the steady growth of Commonwealth maritime law for the regulation of inter-State and foreign shipping trade.

An important result achieved was to confine the operation of State enactments on the subject to ports and harbours in State territorial waters and to intra-State shipping. A significant aspect of the development is the increasing extension of Commonwealth legislation to areas of shipping which, in the past, were considered to be within the exclusive province of State Parliaments. A classic example is provided by the High Court decision in Kirmani v. Captain Cook Cruises Pty. Ltd.<sup>5</sup> The provisions of the new Part VIII of the

4. Administration of Justice Act 1920 (U.K.), s. 5 (1); Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), s. 22; Administration of Justice Act 1956 (U.K.); Merchant Shipping (Liability of Shipowners and Others) Act 1958 (U.K.); Merchant Shipping Act 1979 (U.K.); Supreme Court Act 1981 (U.K.).

5. (1985) 59 A.L.J. 265; see Chapter Eight.





Navigation Act 1912-73 (Comth.) were held not merely to operate as Commonwealth law but also to have repealed Part VIII of the 1894 Act (Imp.) in its application to each of the Australian States. Since the implementation of the 1957 Convention involved an exercise of the "external affairs" power, the new Part VIII will apply as part of the law of each of the Australian States. Another example of such an exercise is the Protection of the Sea (Civil Liability Act) 1981 (Comth.) which is expressed to apply "both within and outside Australia...."<sup>6</sup> Clearly the operation of such Commonwealth legislation on an Australia-wide basis will promote consistency and certainty.

In two important respects, the Australian ship-registration policy differs from that of the United Kingdom. To a limited extent, Commonwealth legislation permits foreigners to own shares in Australian ships. The concept of "genuine link between the State and the ship"<sup>7</sup> is construed in terms of the owners' residence in Australia and the effective control which the Commonwealth Government has over the shipowners. This midway position between the "flag of convenience" concept and the strict British school of thought is a departure from the Imperial policy. While offering scope for foreign investments, the Australian system does not detract from the principle of Australia's sovereignty as an independent nation. Judging from the progress made since the Shipping Registration Act 1981 (Comth.) came into force, the "balanced" approach appears to have worked well.

## II. NEED FOR REFORMS

There appears to be a need for reform of Australian maritime law in a number of directions.

In Chapter Six, we looked at the claims of seamen, cargo owners, necessities men and ship repairers against shipowners. Most of the serious obstacles, which have hitherto prevented the claimants from successfully instituting proceedings in rem against the ship, will be removed after the Draft Admiralty Bill 1985 is implemented as law. Our analysis has shown that the present scheme of statutory compensation does not cover every accidental injury or death suffered by seamen.<sup>8</sup> To fill the gaps, it is necessary to include a "catch-all" provision in the State and Commonwealth legislation. It

6. See s. 5.

7. Geneva Convention on the High Seas 1950, s. 15.

8. As to case illustration, see Chapter Six.



is desirable for seamen's entitlement to statutory compensation to be supplemented by a right to proceed in rem. This reform, if introduced, will bring the protection of seamen into line with current Australian policy.<sup>9</sup>

Another anomaly concerns the use of the time-honoured words "bill of lading" in Australian State legislation. Legislation should be passed to extend the expression to include any through bill of lading, shipping receipt or transport document which, by custom or law, is recognised as evidence of title to the goods carried. The amendment is urgently needed to take cognizance of modern developments and to promote certainty in international maritime trade.

It is crystal clear that purchasers of goods shipped under contracts of carriage subject to the Sea-Carriage of Goods Act 1924-73 (Comth.) suffer a number of disadvantages. The reason is that the Commonwealth Parliament has not given effect to the Brussels Protocol 1968. With regard to the limitation of liability of shipowners and other persons, the protection available is largely based on the 1957 Convention. The United Kingdom's law was upgraded in 1979 when effect was given to the Convention on Limitation of Liability for Maritime Claims 1976.<sup>10</sup> Implementation of the Brussels Protocol 1968 and the 1976 Convention means an unusual increase in the amount of cargo-damage and other claims payable under Commonwealth law. The Australian Government will be adversely affected since it owns the Australian National Line,<sup>11</sup> probably the largest fleet in the country.

There is another aspect of Australian law where reform is needed. An escape or discharge of oil may occur as a result of negligence or some wrongful act, e.g. a collision. Suppose that measures are taken by property owners and others, who are damnified, to prevent or reduce the pollution damage. It is unclear whether, under Australian law, the expenses and liabilities incurred - if recoverable - are limitable under the Navigation Amendment Act 1979 (Comth.).<sup>12</sup>

9. Navigation Act 1912-73 (Comth.), s. 83.

10. Merchant Shipping Act 1979 (U.K.), Schedule 4, supra.

11. The registered name under which the fleet operates.

12. Cf. Merchant Shipping Act 1971 (U.K.), s. 15 (1) and (2), as amended by Merchant Shipping Act 1979 (U.K.), Schedule 5 para. 6 (2).



In terms of the maritime causes and matters presently dealt with, the English Admiralty Court is four stages ahead of the Australian courts. The reason is this: while the jurisdiction of the latter has remained virtually static since the Colonial Courts Admiralty Act 1890 (Imp.) came into force, the jurisdiction of the former has, between 1890 and 1st January, 1982, been extended four times.<sup>13</sup> Besides implementing the principles of the two International Conventions,<sup>14</sup> the Administration of Justice Act 1956 (U.K.) stood out as a milestone in the development of the United Kingdom's maritime law. The Draft Admiralty Bill 1985, when enacted as law, will more than rectify the present situation. In a number of matters, Australian courts will be able to exercise a wider admiralty jurisdiction than the English Admiralty Court. Undoubtedly, Commonwealth legislation is urgently needed to invest Australian courts with new admiralty jurisdiction to entertain all those claims which should be protected by proceedings in rem.

The problems of oil pollution have assumed new dimensions. We saw that the anti-pollution laws passed by State and Commonwealth Parliaments share a common feature. They are enforced mainly by the imposition of severe penalties and strict civil liability on shipowners and masters. In many situations, the basis of such penal and no-fault civil liability is basically inconsistent with the cause-and-effect principle and business realities. The ship carrying a cargo of oil in bulk may be in the possession of a demise charterer, a mortgagee, a salvor or some other person. The spillage could have been caused by the negligence of the ship's engineers. In principle, it is irrational that by being mere registered owners, without possession and control of the ship, they become personally subject to penalties and strict liability for oil spills and pollution damage. It is felt that the penalties, strict liability, expenses for preventing or mitigating pollution damage and clean-up costs - if recoverable - should be enforceable against the ship

13. I.e. by Administration of Justice Act 1920 (U.K.), s. 5; Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), s. 22; Administration of Justice Act 1956 (U.K.); Supreme Court Act 1981 (U.K.), ss. 20 to 24.

14. See Chapter Nine.



by proceedings in rem. It is submitted that a practical, equitable solution to the problems of pollution is for legislation to provide that the proceeds of sale of the ship and her cargo of oil, if any, and the insurance moneys payable will constitute the entire compensation fund. The legislation should enable law enforcers and claimants for pollution damage to proceed in rem against such a fund. It is heartening to note that a move towards rendering the ship answerable under the anti-pollution legislation is made by the Draft Admiralty Bill 1985.<sup>15</sup>

There is another ground for integrating the anti-pollution legislation with maritime law. The enforcement of anti-pollution legislation will, in many instances, interfere with valuable rights acquired under maritime law and with cargo interests. A shipowner's only assets may comprise the ship and freight. Thus, where competing claims arise under anti-pollution legislation and also under maritime law, it is expedient for the same court to distribute the proceeds or fund according to principles within the same branch of law.

The study shows that, where a public nuisance resulting from an oil spill occurs, special or particular damage may be caused. It is suggested that the law should be amended to enable victims of such damage to recover by instituting proceedings in rem against the ship and her cargo of oil from which the spillage emanated.

As a policy matter, it is crucial that the laws of the States and the Commonwealth relating to maritime claims and rights are consistent. It is unfortunate that no provision is made in the legislation of several States for the period of limitation relating to salvage lien, damage lien and wage lien, and for the division of loss in cases of collision caused by the contributory negligence of two or more ships.<sup>16</sup> The neglect has stemmed from the failure of the State Parliaments concerned to give effect to two International Conventions.<sup>17</sup> Legislation is necessary to remove the anomalies in each of those areas by

15. Clause 4 (3) (b). For comments, see Chapter Nine.

16. See Chapter Seven.

17. Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea. Brussels, 1910; International Convention for the Unification of Certain Rules with respect to Collisions between Vessels, Brussels, 1910.





bringing State laws into line with Commonwealth law.

Our inquiry into the various types of competing maritime claims has highlighted the complex problems facing the courts. The "lex fori" approach, as applied by Lord Diplock in "Halcyon Isle"<sup>18</sup>, should be adopted. It commends itself in several ways. Besides being just in terms of principle and sound in logic, it safeguards the rights of claimants acquired under Australian maritime law by preserving the order of ranking of their claims.

### III. THE FUTURE

It is reasonable to presume that the reforms suggested above will, in due course, be substantially, if not fully, implemented. This legislative measure, when completed, will constitute a virtual restructuring of Australian maritime law.

Anti-pollution legislation tends to safeguard the interests of pollution-damage victims at the expense of other persons. Thus where anti-pollution legislation is enforced, whether lawfully or tortiously, maritime lienholders, ship mortgagees and other creditors of the ship are adversely affected. This anomalous situation is not peculiar to Australian law. It is desirable for such valuable rights arising under maritime law to be expressly protected by legislation based on a new international convention to be formulated.

The ship or the proceeds of sale, the cargo carried and the freight, when arrested, constitute a tangible security for the payment of claims enforceable by proceedings in rem. Difficulties will arise with respect to the order of ranking of statutory charges, which render the ship liable to detention, possessory liens and the different classes of maritime liens. Legislation is needed to clarify the position and to deal with the growing uneasiness of competing creditors.

It is envisaged that international maritime conventions will provide the source material to enable Australian maritime law to be systematically updated, and brought into line with its foreign counterparts. To ensure that court decisions are consistent in countries which are signatories to the conventions, Australian judges should adhere to the policy of construing the "convention"

18. [1980] 3-All E.R. 197.



Acts according to the underlying principles. To curtail adventurisms, one Supreme Court judge in each State and a High Court Judge at the Commonwealth level should be assigned the task of coordinating court work covering shipping.

Australia is either slow or disinclined to implement international conventions for limiting the liability of shipowners and other persons. For example, in giving effect to the 1957 Convention under the Navigation Amendment Act 1979 (Comth.), the Commonwealth Parliament expressly excluded, from operation as law, paragraph 1 (c) of Article I.<sup>19</sup> Shipowners and other persons are, therefore, unable to limit their liability imposed by law relating to the removal or destruction of any ship which is sunk or stranded, and liability arising out of "damage to harbour works, basins and navigable waterways." Moreover, the extended protection or relief provided by the Convention on Limitation of Liability for Maritime Claims 1976 is not available under Australian law.<sup>20</sup> Accordingly, there will be a rise in insurance premiums for ships operating in, or carrying goods and passengers to or from, Australia. Unless rectified early, this anomaly will undermine the progress and competitiveness of Australian inter-State and foreign shipping trade. One serious disadvantage is the increased freight charges that have to be borne by both consumers and Australian exporters.

Under a contract of sale, the risk of cargo loss or damage, though not the property in the cargo shipped, may have passed to the buyer. If he is not the holder of the bill of lading or some recognized document of title, he is not entitled to institute an action in rem in his name.<sup>21</sup> However, under an insurance policy,

19. Navigation Act 1912-73 (Comth.), s. 333, as amended by Navigation Amendment Act 1979 (Comth.), s. 65 (1).

20. Cf. Merchant Shipping Act 1979 (U.K.), Schedule 4, supra.

21. In The St. Elefterio [1957] P. 179, the bill of lading endorseses rejected the antedated documents. In an attempt to recover the expected loss, the plaintiffs who were the original bill of lading purchasers succeeded in their action in rem. Their action would have failed if they had not been assignees of the bill of lading contract. It is submitted that the decision in Margarine Union G.m.b.H. v. Cambay Prince Co. Ltd. [1969] 1 Q.B. 219 should not be followed in Australia.



he is deemed to have had an insurable interest. In such cases, the insurer is not entitled to reduce his loss by bringing an action in rem in the assured's name. It is submitted that, to promote certainty in international trade, this serious gap in the law should be filled in the near future. For various reasons, it is not always possible or desirable for an overseas buyer in such circumstances to institute proceedings in the original shipper's name.

It is expected that anomalous situations and inadequacies in the law will be brought to light through various means. A maritime law reform committee should be established permanently to monitor developments in the field and submit specific proposals for reform. Its long-term goal is to ensure that many of the difficulties currently encountered by the law reformers will not recur.



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APPENDIX

*This part is included for reference purposes only.*

AUSTRALIAN LAW REFORM COMMISSION

Reference on Admiralty Jurisdiction

Research Paper No. 3

Draft Legislation

Admiralty Procedure and Rules

Dated: September, 1985

A BILL

FOR

An Act to make provision with respect to Admiralty and maritime jurisdiction, and for related purposes.

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART I - PRELIMINARY

Short title

1. This Act may be cited as the Admiralty Act 1985.

Commencement

2. This Act shall come into operation on a date to be fixed by Proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears -  
"Australia", when used in a geographical sense, includes each external Territory;

"Civil Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage done at Brussels on 29 November 1969 and, if the Protocol to that Convention done at London on 19 November 1976 is in force in relation to Australia, includes that Protocol, a copy of the English texts of which are set out in Schedules 1 and 2 to the Protection of the Sea (Civil Liability Act 1981);

"Federal Court" means the Federal Court of Australia;

"foreign ship" means a ship that is not registered, and is not permitted to be registered, under the Shipping Registration Act 1981;

"freight" includes passage money and hire;

"initiating process" includes a third party notice;

"inland waters" means waters within Australia other than waters of the sea;

"inland waterways vessel" means a vessel that is used or intended to be used wholly on inland waters;

"Liability Convention" means -

- (a) the Civil Liability Convention;
- (b) the Limitation Convention; or
- (c) any other international convention that is in force in relation to Australia and makes provision with respect to the limitation of liability in relation to maritime claims;

"Limitation Convention" means the International Convention relating to the limitation of the liability of owners of sea-going ships signed at Brussels on 10 October 1957, a copy of the English text of which is set out in Schedule 6 to the Navigation Act 1912;

"mortgage", in relation to a ship or a share in a ship, includes a hypothecation or pledge of, and a charge on, the ship or share, whether at law or in equity and whether arising under the law in force in a part of Australia or elsewhere;

"relevant person", in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action in personam;

"sea" includes waters within the ebb and flow of the tide;

"ship" means a vessel of any kind used or capable of being used in navigation by water, however it is propelled or moved, and includes -

- (a) a barge, lighter or other floating vessel; and
- (b) a hovercraft,

but does not include -

- (c) a seaplane;
- (d) an inland waterways vessel; or
- (e) a vessel under construction that has not been launched;

"this Act" includes the regulations and the rules made under this Act.

(2) A reference in this Act to the time when a proceeding is commenced is a reference to the time when the initiating process in relation to the proceeding is filed in, or issued by, a court.

(3) A reference in this Act to goods, in relation to a ship, includes a reference to the baggage and other possessions of a person who is on the ship, being baggage and possessions that are carried or to be carried on the ship.

(4) For the purposes of this Act, where -

- (a) a proceeding on a maritime claim may be commenced against a ship under a provision of this Act (other than section 21); and
- (b) under section 21, a proceeding on the claim may be commenced against some other ship,

the other ship is, in relation to the claim, a surrogate ship.

#### Maritime claims

4. (1) A reference in this Act to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.

(2) A reference in this Act to a proprietary maritime claim is a reference to -

(a) a claim relating to -

- (i) possession of a ship;
- (ii) title to, or ownership of, a ship or of a share in a ship;
- (iii) a mortgage of a ship or of a share in a ship; or
- (iv) a mortgage of a ship's freight;

(b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;

(c) a claim for the satisfaction or enforcement of a judgment given against a ship or other property in a proceeding in Admiralty by a court (including by a court of a foreign country); or

(d) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.

(3) A reference in this Act to a general maritime claim is a reference to -

- (a) a claim for damage done by a ship (whether by collision or otherwise);
- (b) a claim in respect of the liability of the owner of a ship arising under Part II or Part IV of the Protection of the Sea (Civil Liability) Act 1981 or under a law of a State or Territory that makes provision as mentioned in sub-section 7 (1) of that Act;
- (c) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;
- (d) a claim for loss of life, or for personal injury, caused by an act or omission of -

- (i) the owner or charterer of a ship;
- (ii) a person in possession or control of a ship; or
- (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable,

being an act or omission in the navigation or management of the ship, including an act or omission in connection with -

- (iv) the loading of goods on to, or the unloading of goods from, the ship;
- (v) the embarkation of persons on to, or the disembarkation of persons from, the ship; and
- (vi) the carriage of goods or persons on the ship;

[(da) a claim for damages (including a claim for damages for economic loss) caused by an act or omission of -

- (i) the owner or charterer of a ship;
- (ii) a person in possession or control of a ship; or
- (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable,

being an act or omission in the navigation or management of the ship, including an act or omission in connection with -

- (iv) the loading of goods on to, or the unloading of goods from, the ship;
- (v) the embarkation of persons on to, or the disembarkation of persons from the ship; and
- (vi) the carriage of goods or persons on the ship;]

- (e) a claim relating to salvage (including life salvage);
- (f) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;
- (g) a claim for loss of, or damage to, goods carried by a ship;
- (h) a claim in respect of general average;
- (j) a claim in the nature of towage of a ship;
- (k) a claim for pilotage of a ship;
- (m) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied to a ship for its operation or maintenance;
- (n) a claim relating to the construction, alteration, repair or equipping of a ship;
- (o) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a like nature, in respect of a ship;
- (p) a claim for a levy in respect of a ship, including a shipping levy imposed by the Protection of the Sea (Shipping Levy) Act 1981, being a levy in respect of which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia;
- (q) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;
- (r) a claim for an unpaid premium or other like amount due in respect of the insurance of a ship;
- (s) a claim by a master, of a member of the crew, of a ship for wages (including a claim for an amount that a person, as employer, is under an obligation to pay to an employee, whether the obligation arises out of the contract of employment or by operation of law, including by operation of the law of a foreign country);
- (t) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.

#### Application

5. (1) Subject to the succeeding provisions of this section, this Act applies to and in relation to -

- (a) all ships, irrespective of the place of residence or domicile of their owners; and
- (b) all maritime claims, wherever arising, including claims for salvage of cargo or wreck found on land.

(2) This Act applies to and in relation to a proceeding commenced after the commencement of this Act.

(3) This Act, other than section 18, does not apply in relation to a cause of action that arose -

- (a) in respect of an inland waterways vessel; or
- (b) in respect of the use or intended use of the ship concerned on inland waters.

(4) Paragraph (3) (b) does not have effect in relation to a cause of action if, at the time when the cause of action arose, the vessel or the ship concerned was a foreign ship.

#### Certain rights not created or affected

6. This Act does not have effect to extend the cases in which money or property is recoverable or to create a maritime lien or other charge that would not have existed if this Act had not been passed.

#### Innocent passage

7. (1) Where the arrest of a foreign ship would be inconsistent with a right of innocent passage that is being exercised by the ship, this Act does not authorize the arrest.

(2) For the purpose of this section, "innocent passage" has the meaning it has under the Convention on the Territorial Sea and the Contiguous Zone done at Geneva on 29 April 1958, a copy of the English text of which is set out in Schedule 1 to the Seas and Submerged Lands Act 1973.

#### External Territories

8. This Act extends to each external Territory.

#### Act to bind Crown

9. (1) This Act binds the Crown in all its capacities.

(2) This Act does not authorize -

- (a) a proceeding to be commenced as an action in rem against a government ship or government property; or
- (b) the arrest, detention or sale of a government ship or government property.

(3) Where a proceeding has been commenced as an action in rem against a government ship or government property, the court may, if it is satisfied that the proceeding was so commenced in the



ship may be commenced as an action in rem against the ship.

Right to proceed in rem on owner's liabilities

19. Where, in relation to a general maritime claim concerning a ship or property, a relevant person -

- (a) was, at the time when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property concerned; and
- (b) is, at the time when the proceeding is commenced, the owner of the ship or property,

a proceeding on the claim may be commenced as an action in rem against the ship or property.

Right to proceed in rem on demise charterer's liabilities

20. Where, in relation to a general maritime claim concerning a ship, a relevant person -

- (a) was, at the time when the cause of action arose, the owner or charterer of, or in possession or control of, the ship; and
- (b) is, at the time when the proceeding is commenced, a demise charterer of the ship,

a proceeding on the claim may be commenced as an action in rem against the ship.

Right to proceed in rem against surrogate ship

21. A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if a relevant person in relation to the claim -

- (a) was, at the time when the cause of action arose, the owner or charterer of, or in possession or control of, the ship concerned; and
- (b) is, at the time when the proceeding is commenced, the owner of, or a demise charterer of, the other ship.

Service on and arrest of only one ship

22. (1) Where service of initiating process in a proceeding commenced as mentioned in section 17, 19, 20 or 21 has been effected on a ship, service of initiating process in a proceeding on the same claim commenced as mentioned in those sections may not be effected on any other ship.

(2) Where a ship has been arrested in a proceeding commenced as mentioned in section 17, 19, 20 or 21, no other ship shall be

arrested in the proceeding.

(3) Sub-section (2) does not prevent the arrest of a ship in a proceeding on a maritime lien or other charge in respect of the ship.

#### Service and execution out of jurisdiction

23. (1) Initiating process in a proceeding commenced as an action in rem may not be served on a ship or other property out of the locality within which the court that issued it has jurisdiction.

(2) Where a ship or other property is out of the locality within which a particular court has jurisdiction, the ship or property is not liable to arrest by that court under this Act.

(3) Sub-sections (1) and (2) have effect notwithstanding the Service and Execution of Process Act 1901.

#### Proceeds

24. Where, under this Act, a proceeding may be commenced as an action in rem against a ship or other property, the proceeding may be commenced instead against money that has been paid into a court as the proceeds of the sale of the ship or property.

#### Limitation of liability under Liability Conventions

25. (1) A person who apprehends that a claim for compensation under a law (including a law of a State or a Territory) that gives effect to provisions of a Liability Convention may be made by some other person may apply to the Federal Court to determine the question whether liability may be limited under that law.

(2) Jurisdiction is conferred on the Federal Court in respect of proceedings under sub-section (1), but this sub-section does not affect the jurisdiction of any other court.

(3) On an application under sub-section (1), the Federal Court may, in accordance with the law referred to in that sub-section -

- (a) determine whether the applicant's liability may be so limited and, if it may be so limited, determine the limit of that liability;
- (b) order the constitution of a limitation fund for the payment of claims in respect of which the applicant entitled to limit his or her liability; and
- (c) make such orders as are just with respect to the administration and distribution of that fund.

(4) Where a court has jurisdiction under this Act in respect of a proceeding, that jurisdiction extends to entertaining a defence in

the proceeding by way of limitation of liability under a law that gives effect to provisions of a Liability Convention.

#### Proceedings under Civil Liability Convention

26. A proceeding under this Act on a maritime claim referred to in paragraph 4 (3) (b) shall not be brought otherwise than in accordance with paragraphs 1 and 3 of Article IX of the Civil Liability Convention, whether or not the proceeding also relates to another maritime claim or to a maritime lien or other charge.

### PART IV - TRANSFER AND REMITTAL OF PROCEEDINGS

#### Transfer

27. (1) A court in which a proceeding under this Act is pending may, at any stage of the proceeding, upon application or of its own motion, by order, transfer the proceeding to some other court that has jurisdiction under this Act with respect to the subject-matter of the claim.

(2) Where a proceeding has been so transferred, the second-mentioned court shall proceed as if the proceeding had been commenced in that court and as if the same or the like steps in the proceeding had been taken in that court as were taken in the first-mentioned court and as if the orders made by the second-mentioned court in the proceeding had been made by the first-mentioned court.

#### Remittal

28. (1) Where a proceeding commenced as an action in rem is pending in the Federal Court or in the Supreme Court of a State or Territory, the Federal Court or that Supreme Court may remit the proceeding for hearing to a court that, apart from this Act, would have had jurisdiction if -

- (a) the proceeding had been commenced as an action in personam on the claim against the relevant person; and
- (b) service of initiating process in that proceeding had been effected within the locality within which the court to which the proceeding is remitted has jurisdiction.

(2) The court from which the proceeding is remitted may give such directions as are appropriate in relation to the further steps to be taken in the proceeding and, subject to any such directions, the court to which the proceeding is remitted may give directions of a like kind.

(3) The court from which a proceeding is remitted under this section shall give effect to a judgment or order given in the proceeding, being a judgment or order that finally disposes of the proceeding, as though that judgment or order were a judgment or order of that court in the proceeding.

(4) Sub-section (3) does not affect -

- (a) any right of appeal that a party to the proceeding has; or
- (b) the power of a court to stay execution pending an appeal.

(5) A court to which a proceeding has been remitted under this section is invested with federal jurisdiction, or, if that court is a court of Territory, jurisdiction is conferred on that court, in respect of the proceeding.

#### Security in relation to stayed or dismissed proceedings

29. (1) Where -

- (a) it appears to the court in which a proceeding under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Australia or elsewhere) or by a court of a foreign country; and
- (b) a ship or other property is under arrest in the proceeding, the court may order that the proceeding be stayed on condition that the ship or property be retained by the court as security for the satisfaction of an award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.

(2) Sub-section (1) does not limit any other power of the court.

(3) The power of the court to stay or dismiss the proceeding includes power to do so on such conditions as are just, including a condition -

- (a) with respect to the institution or prosecution of the arbitration or proceeding in the court of the foreign country; and
- (b) that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of the foreign country.

(4) Where a court has made an order under sub-section (1) or (3), the court may make such interim or supplementary orders as are

appropriate in relation to the ship or property for the purpose of preserving -

- (a) the ship or property; or
- (b) the rights of a party or of a person interested in the ship or property.

(5) Where -

- (a) a ship or other property is under arrest in a proceeding;
- (b) an award or judgment as mentioned in sub-section (1) has been made in favour of a party; and

(c) the award or judgment is enforceable by the court,

then, in addition to any other proceeding that may be taken by the party to enforce the judgment or award, the party may apply to the court in the stayed proceeding for an appropriate order in relation to the ship or property to give effect to the award or judgment.

Power to deal with ship or other property

30. (1) This section applies where a proceeding has been transferred or remitted under the preceding provisions of this Part and a ship or other property is under arrest in the proceeding.

(2) The court from which the proceeding was transferred or remitted may -

- (a) deal with the ship or property as though it were under arrest in a proceeding that had not been so transferred or remitted; and
- (b) make such orders as are necessary or convenient for transferring the custody of the ship or property to the court to which the proceeding has been so transferred or remitted.

(3) Where a court has made orders under paragraph (2) (b), the court to which the proceeding has been transferred or remitted has the same powers in relation to the ship or property as it has in relation to a ship or other property that is under arrest in a proceeding commenced in that court.

## PART V - MISCELLANEOUS

Effect of judgment

31. (1) Where judgment is given for the plaintiff in a proceeding commenced as an action in rem, the extent to which a defendant in

the proceeding who is a relevant person in relation to the maritime claim concerned is personally liable on the judgment is not limited by the value of the ship or other property against which the proceeding was commenced.

(2) Where judgment is given for the plaintiff in a proceeding commenced as an action in rem, a defendant in the proceeding who is not a relevant person in relation to the maritime claim concerned is not personally liable on the judgment except so far as it is an order for costs against that defendant.

(3) Sub-section (2) does not prevent execution being levied against a ship or other property that is under arrest in a proceeding. Related corporations, & c.

32. (1) In determining the ownership of a ship for the purposes of a provision of this Act, but without limiting the generality of any such provision, the succeeding provisions of this section have effect.

(2) Where the owner of a ship is a body corporate -

(a) a ship owned by a body corporate that is, or would, if both bodies corporate were incorporated in the Australian Capital Territory, be, a related corporation within the meaning of the Companies Act 1981 in relation to the first-mentioned body corporate, shall be taken to be owned by the first-mentioned body corporate;

(b) a ship owned by a natural person who is in a position, by virtue of his or her shareholding or other interest in the body corporate, to control the operations of the body corporate shall be taken to be owned by the body corporate; and

(c) if a natural person is in a position, by virtue of his or her shareholding or other interest in the body corporate and in some other body corporate, to control the operations of both the bodies corporate -- a ship owned by the second-mentioned body corporate shall be taken to be owned by the first-mentioned body corporate.

(3) Where the owner of a ship is a natural person who is in a position, by virtue of his or her shareholding or other interest in a body corporate, to control the operations of the body corporate, a ship owned by the body corporate shall be taken to be owned by the natural person.

## Powers of Federal Court in relation to register

33. In a proceeding in the Federal Court on a proprietary maritime claim, the orders that the court may make include orders that a court may make under the Shipping Registration Act 1981.

## Co-ownership disputes

34. In a proceeding on a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship, the orders that the court may make include orders -

- (a) for the settlement of accounts outstanding and unsettled; and
- (b) directing that the ship concerned, or a share in the ship, be sold.

## Damages for unjustified arrest, & c.

35. (1) Where -

- (a) a person unreasonably and without good cause demands excessive security in relation to a proceeding commenced or to be commenced under this Act; or
- (b) a party to a proceeding under this Act unreasonably and without good cause -
  - (i) obtains the arrest of a ship or other property under this Act; or
  - (ii) withholds consent to the release from arrest under this Act of a ship or other property.

the person or party is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

(2) The jurisdiction of a court in which a proceeding under this Act is pending extends to determining a claim arising under sub-section (1) in relation to the proceeding.

(3) Where no such proceeding is pending, jurisdiction is vested in the Federal Court, the Supreme Courts of the States are invested with federal jurisdiction and jurisdiction is conferred on the Supreme Courts of the Territories, in respect of matters arising under sub-section (1).

(5) The jurisdiction conferred on a court of a State, or with which a court of a Territory is invested, under this section is

exclusive of the jurisdiction that belongs to any other court of the State or Territory, respectively.

#### Priorities

36. Notwithstanding the provisions of any other law (including a law of a State or Territory), where a proceeding has been commenced under this Act against a surrogate ship in respect of a claim concerning some other ship, the order in which general maritime claims against both the ships shall be paid out of the proceeds of the sale of the surrogate ship shall be determined as if all the claims were claims against the surrogate ship.

#### Statutory powers of detention

37. (1) This section applies where -

- (a) a law other than this Act (including a law of a State or Territory) confers on a person a power to detain a ship in relation to a civil claim; and
- (b) a proceeding on the civil claim may, under this Act, be commenced as an action in rem against the ship.

(2) Where a ship is under arrest under this Act, the power to detain the ship may not be exercised.

(3) The exercise of the power to detain a ship does not prevent the arrest of the ship under this Act.

(4) Where a ship that has been detained under a power referred to in paragraph (1) (a) is arrested under this Act, then, by force of this sub-section, the detention is suspended for so long as the ship is under arrest.

(5) Where a ship that has been detained or would, but for sub-section (2), be liable to be detained, under such a power is arrested and sold under this Act, the civil claim is, unless the court otherwise directs, payable in priority to any claim against the ship other than the claim of the Marshal for expenses.

#### Limitation periods

38. (1) A proceeding may be brought under this Act on a maritime claim, or on a claim on a maritime lien or other charge, at any time before the expiration of -

- (a) the limitation period that would have been applicable in relation to the claim if it had been brought otherwise than



under this Act; or

- (b) if the claim could not have been so brought -- a period of 3 years after the cause of action arose.

(2) Sub-section (1) does not apply if a limitation period is fixed in relation to the claim by an Act, an Imperial Act, an Act of a State or an Act or Ordinance of a Territory, including such an Act or Ordinance in its application in a part of Australia.

(3) Where a court has, otherwise than by virtue of this section, power to extend a limitation period in respect of a claim that is of the same kind as a maritime claim, or a claim on a maritime lien or other charge, then, by force of this sub-section, it has a like power to extend the period fixed by sub-section (1).

(4) The absence of the ship or property concerned from the jurisdiction of the court shall not be taken into account in relation to the exercise of the power conferred by sub-section (3).

(5) A claim brought within a period fixed by or under this section is not affected by the operation of the doctrine of laches.

#### Mode of trial

39. A proceeding commenced as an action in rem, a limitation proceeding and a proceeding (whether or not under the Act) that is associated with a proceeding commenced as an action in rem or a limitation proceeding shall be tried without a jury and without assessors.

#### Appeals

40. (1) Where, but for this section, a person would have a right to seek leave or special leave to appeal from a judgment or order of a court given in a proceeding under this Act to the Full Court of the Supreme Court of a State as defined by sub-section 24 (5) of the Federal Court of Australia Act 1976, the application for leave or special leave shall be made instead to the Full Court of the Federal Court.

(2) Where, but for this section, a person would have a right to appeal from a judgment or order of a court given in a proceeding under this Act to the Full Court of the Supreme Court of a State as defined by sub-section 24 (5) of the Federal Court of Australia Act 1976, the appeal shall be made instead to the Full Court of the Federal Court.

### Jurisdiction limits

41. The jurisdiction invested or conferred on a court of a State or Territory by a provision of this Act is invested or conferred -

- (a) within the limits of jurisdiction of the court, whether those limits are as to locality, subject-matter or otherwise; and
- (b) to the extent that the Constitution permits.

### Fees

42. Where a person or body has power under a law (including a law of a State or Territory) to prescribe fees or scales of fees in connection with proceedings of any kind in a court, then, by force of this section, the person or body has a like power to prescribe fees in connection with the exercise of powers and the performance of duties and functions by the court or by an officer of the court under this Act.

### Rules

43. (1) The Governor-General may make Rules, not inconsistent with this Act, making provision in relation to the practice and procedure to be followed in courts exercising jurisdiction under this Act and matters incidental to such practice and procedure.

(2) In particular, the Rules may make provision in relation to -

- (a) pleading;
- (b) appearance;
- (c) the service and execution of process;
- (d) bail;
- (e) caveats against arrest or release of ships and other property;
- (f) the arrest, custody and sale of ships and other property;
- (g) the furnishing of security;
- (h) the forms to be used;
- (j) records and registers and the inspection of those records and registers;
- (k) limitation proceedings, including -
  - (i) the parties to those proceedings; and
  - (ii) the operation of determinations made in those proceedings;
- (l) evidence.
- (m) enforcement and satisfaction of judgments of courts in matters under this Act;

(3) The Rules may prescribe penalties, not exceeding . . . , for offences against the Rules.

(4) Jurisdiction is vested in the Federal Court, the several courts of the States are invested with federal jurisdiction and, to the extent that the Constitution permits, jurisdiction is conferred on the courts of the Territories, in respect of matters arising under the Rules.

(5) The jurisdiction conferred on a court of a Territory, and the jurisdiction with which a court of a State is invested, under subsection (4) does not extend in respect of a ship or other property that is not within the Territory or State, respectively.

(6) Rules made under this section shall -

- (a) be notified in the Gazette;
- (b) subject to this section, take effect from the date of notification or, if some later date is fixed by or in accordance with the Rules, that later date; and
- (c) be laid before each House of Parliament within 15 sitting days of that House after the making of the Rules.

(7) Part XII of the Acts Interpretation Act 1901 applies in relation to Rules made under this section as it applies in relation to regulations.

#### Regulations

44. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters -

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.